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No. 2360

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE BEATSON COPPER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

JOHN PEDRIN,

Defendant in Error.

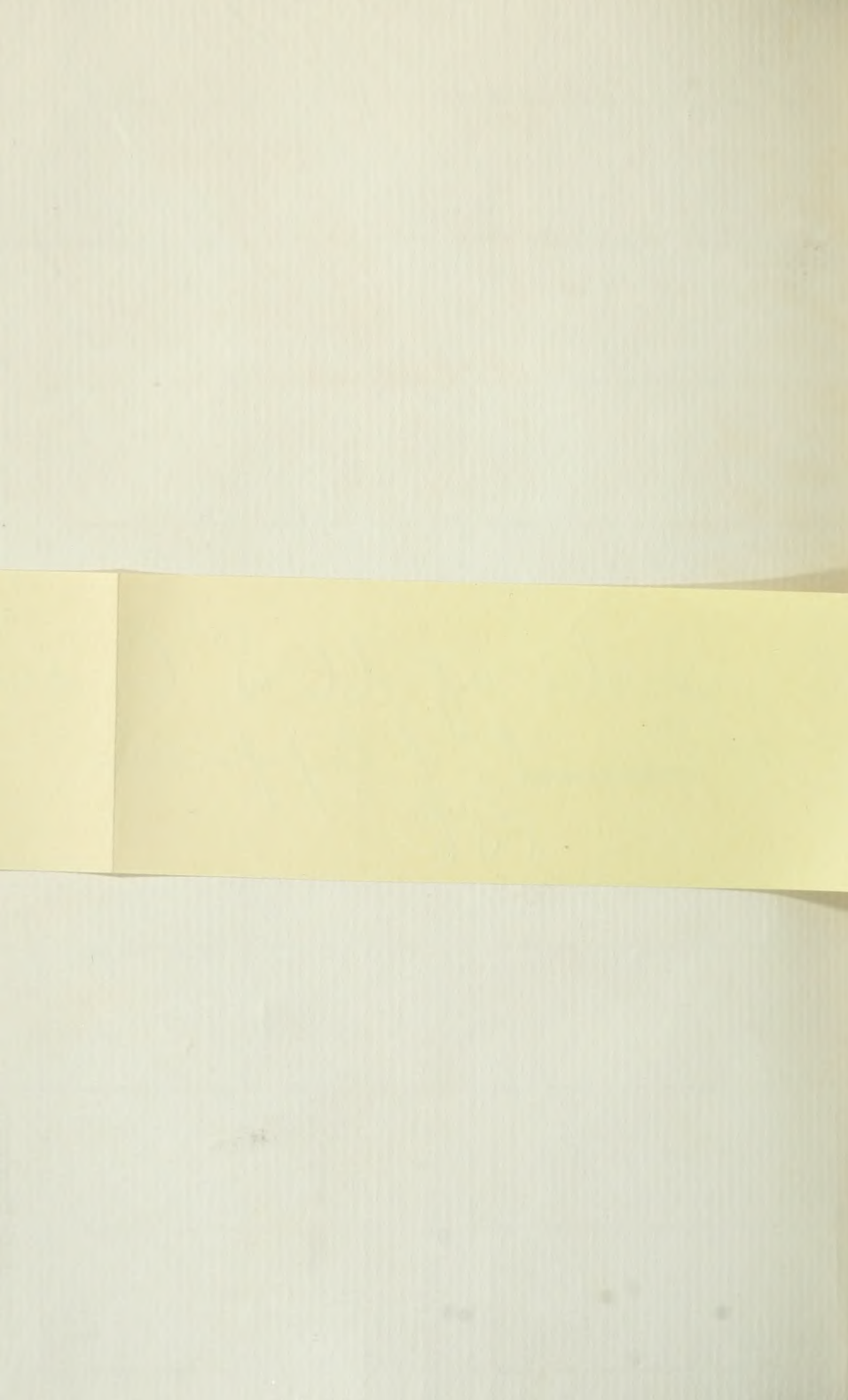
Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Third Division.

FILED

FEB 14 1914

Records of U.S. Circuit
Court ~~Court~~ of appeals
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United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

E. E. RITCHIE, Valdez, Alaska,
Attorney for Plaintiff and Appellee, John,
Pedrin.

R. J. BORYER, Cordova, Alaska,
Attorney for Defendant and Appellant,
The Beatson Copper Company, a Cor-
poration. [1*]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpora-
tion,

Defendant.

Complaint.

Plaintiff alleges:

I.

That defendant is a corporation engaged in operat-
ing a mine on Latouche Island, Prince William
Sound, Territory of Alaska.

II.

Part of the operation of said mine is conducted by
detaching the ore body and adjacent earth and rock
from the walls of a large cavity called a "glory hole"

*Page-number appearing at foot of page of original certified Record.

by the use of dynamite inserted into drill holes and discharged, according to usual mining custom. After firing a charge or "shot" of dynamite in the walls of the glory hole it usually happens that portions of the wall are loosened but do not fall with the mass brought down by the dynamite discharge. It is the rule absolutely required by safe mining, and usually followed at defendant's mine, after a "shot" is fired to make a careful examination of adjacent walls from which fragments might fall upon men working near, and to "bar down" or pry loose with crowbars all loosened portions of the wall. These precautions for insuring a safe place for miners and laborers to work are recognized rules of careful and safe mining and constitute a duty devolving upon the mine operator and his vice-principal, [2] the foreman of the shift boss directing the work.

III.

On or about February 1, 1913, plaintiff was working for the defendant as a mucker in said glory hole on the night shift, beginning after dark, at 7 o'clock P. M. A short time before plaintiff began work on said shift a powder charge had been fired in one side of said glory hole to bring down ore and rock. After the mass of ore, rock and earth severed from the wall by said shot had fallen, defendant negligently, recklessly and wrongfully failed and neglected to make sufficient examination of the wall from which said rock and earth had been detached and to "bar down" all loose rock and earth adhering to said wall. When plaintiff began work on the night shift at seven P. M. he had no knowledge of the condition of

the wall or of the fact that defendant had failed to take the usual and proper precautions for the protection of the men working in said glory hole by carefully removing from the wall all loose portions unsettled by the shot before mentioned and still adhering thereto. Plaintiff's work was that of "bulldozing" or breaking large rocks with powder at the bottom of the glory hole. From 11:30 P. M. to 12:30 A. M. plaintiff was off duty at dinner, and while he was absent from the glory hole a dynamite charge in a portion of the wall adjacent to that where the afternoon shot had been fired, as an effect of which rock and earth were still further loosened in that part of the wall last mentioned. Immediately after plaintiff returned to work in the glory hole at 12:30 A. M. several tons of rock and earth loosened by the afternoon shot and further loosened by the adjacent shot fired a few minutes before, suddenly, without warning, and with great velocity and force, fell upon plaintiff, who was stooping over at his work, before he had time to move out of its way, causing plaintiff the following injuries, to wit, the humerus of plaintiff's left arm was broken and the flesh and muscles of said arm above the elbow were severely contused and lacerated; a deep gash several inches long was cut through the [3] flesh to and into the bone along plaintiff's sternum from a point just below the clavicle, severing ligaments attaching several ribs to the sternum, the same source of injury severely lacerating and contusing the flesh and muscles along said gash and below it; a deep and ragged cut was made in the upper left breast between the shoulder and nipple

lacerating the flesh and severing the muscles; a gash four inches long was cut to the bone from the temple down to the cheek. Plaintiff lay in the hospital at Latouche for more than three months before he was able to leave his bed. During nearly all of that time plaintiff's arm was confined in a plaster cast, and his body was closely bound so as to prevent the moving of muscles that by action would open the cuts and lacerations of the body heretofore described. Plaintiff remained in the hospital nearly six months before he was sufficiently recovered to be discharged. During his confinement in said hospital plaintiff suffered great and constant physical pain and anguish of mind, and for some time after he was discharged continued to be sick, sore, lame and disordered. Plaintiff is not yet able to perform manual labor which puts any strain upon his left arm and upper body where he sustained the injuries complained of, and he still suffers pain when he exerts the said injured parts. Plaintiff believes that his injuries are to some degree permanent, that he will never fully recover therefrom and attain the same health and strength he possessed before suffering said injuries. At the time of suffering said injuries plaintiff was a strong able-bodied man, thirty-three years of age, a miner by occupation, at which employment he was able to earn, and when opportunity offered had earned, and received the highest going wages as a miner, having at times received four dollars a day and board. At the time of his said injury he was receiving two dollars and a half per day and board from defendant corporation. For more than six months

after his said injuries plaintiff was [4] unable to engage in any gainful occupation or to perform any work by which he could earn a livelihood, and he is now unable and will remain unable for a long time to come to work at his regular occupation as a miner, and may never be able to do so; he is able now only to perform inferior and menial tasks not requiring great strength, and in performing such work he often suffers great pain resulting from exertion and strain of the injured parts of his body and left arm.

IV.

Plaintiff alleges that while working on the shift in said mine as hereinbefore recited he was under the immediate direction and orders of one Green, whose first name is to plaintiff unknown, who was then and there shift boss or foreman of said work and vice-principal of defendant corporation, and it was the duty of said foreman acting for defendant corporation to provide a reasonably safe place to work for the men under his direction by taking all reasonable precautions for their protection, and in discharge of such duty it was incumbent upon him to see and provide that after a shot was fired in the wall of said glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning become detached. Plaintiff alleges that said foreman and vice-principal willfully and negligently and recklessly failed to discharge said duty in this instance, and that his said wrongful neglect was the direct and proximate cause of plaintiffs' said injuries. Plaintiff alleges that when he went to work on the night shift as aforesaid the said glory

hole was very dark and it was necessary to perform his said work of bulldozing by the light of a lantern which was held for him by another man; that he had no knowledge of [5] the unsafe condition of said wall and no means of knowledge in the ordinary course of his employment; that when he returned to work in said glory hole after dinner at about 12:30 A. M. as aforesaid he had no knowledge of the fact that the wall above his place of work was in a dangerous condition, and had no means in the ordinary course of his employment of acquiring knowledge of that fact; that he was ordered by said foreman to resume immediately his work of bulldozing at the bottom of the glory hole and was so engaged and was working by the light of a lantern held by a co-employee, named John Schmidt, and commonly called "Russian John," when the mass of rock and earth fell upon him from said wall as hereinbefore described.

V.

Plaintiff alleges that by reason of the injuries so suffered by him as hereinbefore described he has been damaged in the sum of Ten Thousand Dollars.

WHEREFORE plaintiff prays judgment against the defendant, the Beatson Copper Company, for the sum of Ten Thousand Dollars (\$10,000), his damages so as aforesaid sustained, and for the costs of this action.

E. E. RITCHIE,

Attorney for Plaintiff.

United States of America,

Territory of Alaska,—ss.

John Pedrin, being duly sworn, says he is the

plaintiff in this action; that he has read the foregoing complaint and he believes the same to be true.

JOHN PEDRIN.

Subscribed and sworn to before me this 20th day of September 1913.

[Seal]

ANTHONY J. DIMOND,

Notary Public.

My commission expires Mar. 13, 1917. [6]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sept. 20, 1913. Arthur Lang, Clerk. [7]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Answer.

The Beatson Copper Company, a corporation, for answer to the complaint in this action says:

I.

Answering paragraph I of the complaint, admits all of the allegations contained therein.

II.

Answering paragraph II of the complaint, admits that part of the operation of its mine is conducted

by detaching the ore body and adjacent earth and rock from the walls of a large cavity called the glory hole by use of dynamite inserted into drill holes and discharged.

Says that it has no knowledge or information sufficient to form a belief as to all other allegations set out in paragraph II; therefore denies same.

III.

Answering paragraph III defendant admits that the plaintiff was working for the defendant on or about February 1st, 1913, but says that it does not have knowledge or information sufficient to form a belief as to each and all of the other allegations alleged in paragraph III of the complaint, therefore denies same.

IV.

Answering paragraph IV defendant says that [8] it does not have knowledge or information sufficient to form a belief as to each and all of the allegations contained therein; therefore denies same.

V.

Answering paragraph V defendant denies each and all of the allegations contained therein.

AFFIRMATIVE DEFENSES.

I.

Defendant for first affirmative defense alleges that if the plaintiff was injured at the time and place set out in his complaint, that such injuries arose from and grew out of risks incident to his employment and which the plaintiff assumed.

II.

That if plaintiff was injured at the time and place

mentioned in his complaint, that such injuries were due to the negligence of the plaintiff himself *and or* by the negligence of a fellow-servant.

WHEREFORE defendant prays that this action be dismissed and that it be allowed its costs and disbursements in this action.

R. J. BORYER,
Attorney for Defendant.

United States of America,
District of Alaska,—ss.

R. J. Boryer, being first duly sworn, upon his oath deposes and says that he is attorney for the Beatson Copper Company, the defendant herein; that he has read the above answer, knows its contents and believes same to be true. That this verification is made by him for the reason that the officers of the defendant company are about seventy miles distant and this affiant is unable to secure their verification, and for the further reason that E. E. Ritchie, attorney for [9] plaintiff, has consented that this answer can be verified by this affiant and that he would waive verification as required by the statutes.

R. J. BORYER.

Subscribed and sworn to before me this 20th day of October, A. D. 1913.

[Seal]

THOS. P. GERAGHTY,
Notary Public.

My commission expires Feb. 13th, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 21, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [10]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY a Corpo-
ration,

Defendant.

Motion for Nonsuit.

Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court for a nonsuit in this action for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company, and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any other manner trying to [11] ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant and the duties, responsibility and authority of said foreman of shift boss in connection with the defendant company while the evidence does show that said foreman or shift boss in connection with the defendant company along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this company.

R. J. BORYER,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 10, 1913. Arthur Lang, Clerk. By Thos. P. Geraghty, Deputy. [12]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY a Corporation,

Defendant.

Motion for Directed Verdict.

Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court to direct a verdict in favor of the defendant for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or whole where the accident occurred for about two weeks, and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the [13] injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

V.

For the further reason that the defendant in its affirmative defense alleges and pleads that if the plaintiff was injured, such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plain-

tiff himself and or by the negligence of a fellow servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting same.

R. J. BORYER,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 11, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[14]

[Bill of Exceptions.]

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

TRANSCRIPT OF RECORD.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard on Monday, the tenth day of November, 1913, at 10 o'clock A. M. before the Honorable F. M. BROWN, Judge of said Court, and a jury:

The plaintiff being represented by his attorney and counsel, E. E. RITCHIE, Esq.:

The defendant being represented by its attorney and counsel, R. J. BORYER, Esq.:

A jury having been empaneled, an opening statement was made by Mr. Ritchie on behalf of the plaintiff, Mr. Boryer waiving any statement on behalf of the defendant.

WHEREUPON the following additional proceedings were had: [15]

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Exceptions Taken by Defendant During Examination of Jurors.**Examination of Juror T. J. Lane.**

(By Mr. BORYER.)

Q. Are you acquainted with the plaintiff in this case? A. No.

Q. Are you acquainted with the defendant corporation? A. No.

Q. Have you heard anything of the facts in the case? A. No.

Q. Have you any bias or prejudice against corporations? A. No.

Q. Do you feel if you were retained as a juror in this case that you could give them the same consideration as you would an individual?

A. Yes, sir.

Q. Are you acquainted with Mr. Ritchie?

A. Yes.

Q. The relation of attorney and client doesn't exist between you? A. No.

Mr. BORYER.—We pass the juror for cause.

(By Mr. RITCHIE.)

Q. When you lived at Katalla were you identified in any way with the Katalla Company? A. No.

Q. You never have done any business with those companies? A. No, sir.

Mr. BORYER.—At this time I desire to interpose an objection to the questions pertaining to the Katalla Company or the [17—2] Copper River & Northwestern Railway Co. or any company other than the Beatson Copper Co.

Mr. RITCHIE.—It is only to lay the foundation of a peremptory challenge if it became necessary. I might object to his asking these jurors whether the relation of attorney and client exists between the jurors and myself, because that is not a necessary disqualification.

By the COURT.—I think it is proper to determine the character of employment the juror may have had and as affecting his feeling in cases of this kind. The objection will be overruled.

To which ruling of the Court counsel for defendant then and there duly excepted; exception allowed.

By the COURT.—The jurors will be cautioned that it has nothing to do with this case—it doesn't matter whether one of the jurors or anyone else worked for the Katalla Company or any other company,—the only issue in this case is the Beatson Copper Co., and you should not allow any matter of that kind to prejudice your minds.

Mr. RITCHIE.—I particularly avoided the use of the generic term by which those companies are commonly known.

Mr. BORYER.—We desire to take an exception to the remark of counsel. Exception allowed.

Examination of Juror W. Thomas.

(By Mr. BORYER.)

Q. You reside in Valdez? A. Yes, sir.

Q. How long have you resided in Valdez?

A. A little over five years.

Q. What is your occupation? [18—3]

A. Meat-cutter.

Q. Are you acquainted with the plaintiff in this

case? A. I have seen him several times.

Q. Are you acquainted with the defendant, the Beatson Copper Company? A. No, I think not.

Q. Are you acquainted with Mr. Van Campen?

A. No.

Q. Have you heard any of the facts in this case?

A. I can't say I have, no; I heard of the case, that there was such a case pending, that is all.

Q. You have not heard any of the facts in the case? A. Not that I know to be the facts; no.

Q. You have heard the case talked of?

A. I heard some of the boys speak of it down here.

Q. Heard who?

A. One of the boys that worked down at the mine.

Q. Did he go into details, how it happened?

A. No.

Q. Where was it you heard this conversation?

A. Here in Valdez.

Q. Between whom? A. Mr. Florence.

Q. Who was doing the talking, the plaintiff?

A. No.

Q. Do you recall who it was?

A. Florence was the party's name that was telling me about it—I think he happened to be working down there last winter.

Q. From what you have heard, do you feel that you could sit as a juror in this case? [19—4]

A. I can't say that I should sit; no.

Q. You think you have formed impressions from what you have heard that it would take evidence to remove? A. To a certain extent, yes.

Q. And you don't feel, then, that you should sit as a juror? A. Why, no, I do not.

Q. You have formed an opinion from what you heard at that time? A. Slightly.

Q. It would take some evidence to remove it?

A. Some evidence.

Mr. BORYER.—We challenge the juror for cause.

(By Mr. RITCHIE.)

Q. Is Mr. Florence the young man who used to work in the post-office here? A. Yes, sir.

Q. He was working for the Beatson Copper Co. at the time this accident happened?

A. I wouldn't say whether he was working there at the time or whether he heard it; he told me there was such a case pending,—that is about all I can say.

Q. Did he claim to know the facts?

A. I couldn't say he did.

Q. Did he give you a pretty general idea of what the case was like and what the evidence would probably be? A. Yes, sir.

Q. So you have now you think an opinion as to the merits? A. Yes, somewhat.

Q. So that you could not start on the trial of the case as an absolutely impartial juror? [20—5]

A. No, I could not.

Q. Suppose at a very early stage of the trial it appeared that the purported facts already stated to you were wholly wrong, could you then try the case as though you had never heard anything regarding it? A. Yes.

By the COURT.—Do you feel that you could lay aside any opinion you may have and absolutely disregard it and try the case and decide it entirely on

the evidence that you hear here in the courtroom?

A. Yes, sir.

By the COURT.—The challenge will be denied.

Defendant is allowed an exception to the ruling.

[21—6]

[Testimony of John Pedrin, the Plaintiff, in His Own Behalf.]

JOHN PEDRIN, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. John Pedrin.

Q. Are you the plaintiff in this action?

A. Yes, sir.

Q. Where were you born?

A. I was born in California, San Diego.

Q. How old are you? A. I am over 34 now.

Q. What has been your occupation since you have been grown up?

A. Well, I have been following the mines—fireman, working in the mines and firing.

Q. Where have you worked in mines?

A. I worked in Alaska, in Gray's.

Q. E. F. Gray's? A. Yes, sir.

Q. Whereabouts?

A. The property he has got above the Bonanza, above the Kennecott, the glaciers.

Q. Where else have you worked?

A. I worked in another prospect there that Iverson had, right in Kennecott there—I worked a couple of months there.

(Testimony of John Pedrin.)

Q. How long have you been in Alaska?

A. About eight years.

Q. Have you been working as a miner during all or most of that time?

A. No, sir, I haven't worked always in mining—I have worked [22—7] on the railroad. I worked over in Kennecott in the Bonanza mine,—not in the mine, but in the camp there; I worked for Mr. O'Neil and I worked at Miles Glacier, 49.

Q. On the railroad? A. Yes.

Q. You mean O'Neil who used to be a foreman on the railroad?

A. Yes, at that bridge and I worked all over, wherever I got a job I went to work.

Q. Are you an experienced miner, that is, do you understand all ordinary mining work?

A. I am no machine-man, but I can work in the mine—I have always been a hammer-man, a single jack.

Q. You understand hand drilling? A. Yes, sir.

Q. You have done a good deal of that?

A. Yes, I have done a good deal of that.

Q. And you consider yourself a good average man as a miner?

A. Well, where I have been working in the mine.

Q. Where you have worked, have you drawn as high wages as other men, as a miner?

A. Yes—where I have worked as a miner; yes.

Q. When you were working for Mr. Gray were you working as a miner or mucker? A. A miner.

A. And drawing miner's wages? A. Yes, sir.

(Testimony of John Pedrin.)

Q. When did you go to the Beatson Copper Co. mines?

A. I went early in the fall,—about this time of the year.

Q. Last year? A. Yes, sir. [23—8]

Q. About November 12th?

A. Yes, sir, about—something like that; I am not exact about the date.

Q. Who was superintendent of the mine at that time? A. Mr. Van Campen.

Q. Did you go to work at once when you went there?

A. No, I stayed there about a couple of weeks or more; I don't remember exactly.

Q. Then were you put at work?

A. Yes, they put me to work after a while, when I was there.

Q. What work did you do?

A. I went mucking.

Q. What wages were you paid there?

A. I was getting \$2.50 and board.

Q. That was the regular wages for muckers?

A. Yes, sir.

Q. Why were you put to work as a mucker—did you ask for work as a mucker or miner?

A. As miners they only had two or three fellows to run the machine and they didn't have any work for a miner and I asked for a single jack.

Q. You went mucking because that was the best job they could give you?

A. Yes, that was the job they gave me.

(Testimony of John Pedrin.)

Q. Do you remember about what time this happened—this accident?

A. I don't know exactly what time it was—it was after one o'clock, anyhow.

Q. About what time in the month?

A. Well, it was in January,—I think about the last of the [24—9] month—I ain't sure.

Q. What month?

A. In January, after Christmas.

Q. January, last winter? A. Yes, sir.

Q. January, 1913? A. Yes, sir.

Q. How long had you been working steadily when this accident happened?

A. Steady I was working about two weeks.

Q. What were you doing during those two weeks?

A. Well, I was mucking and shoveling the snow—shoveling the cars and cleaning the track and bridge there.

Q. Where did you work as a mucker?

A. Well, I worked sometimes in that glory hole,—any place they put me to work.

Q. Describe the mine, the glory hole and the side-hill there as well as you can, so as to make the jury understand the place where you were working—some of them have seen it and others I expect have not—describe the glory hole and the surrounding hill, the works around there as well as you can.

A. There is a glory hole—there is a tunnel, a big bluff—it is a big bluff and then at the foot of that bluff about 25 or 30 ft. there is a shaft there they call 38, and they start that glory hole at the mouth

(Testimony of John Pedrin.)

of that shaft, and so we were working, keep on coming toward the blacksmith-shop, that is from the bluff.

Q. Now, are there two tunnels there about on the same level?

A. Well, it is a tunnel around there and there is a little smaller tunnel there—there are several little tunnels [25—10] there,—I don't know how long they are.

Q. This shaft, where is that with relation to one of the tunnels—does one of the tunnels run off to the south?

A. A tunnel runs like that from that shaft, there is a long tunnel there.

Q. Is this shaft close to the tunnel or in it?

A. It is about 50 feet from it, I guess—I don't know exactly how far it is.

Q. You say they started the glory hole right at the shaft? A. Yes, sir.

Q. Where does that shaft lead out to?

A. Leads to the level, to the lower level, so they get their ore on the cars below.

Q. That is, they drop ore through this shaft to the lower level?

A. Yes, sir, to get it out to the bunkers.

Q. How large is this glory hole?

A. It is probably about 6 feet wide—I am not sure, 5 or 6 feet—I am not sure how wide it is.

Q. Is there more than one glory hole there?

A. Well, the glory hole, when I was working there was only one that I know of.

Q. Now, you refer to the raise there?

(Testimony of John Pedrin.)

A. Which raise?

Q. Did you mean the shaft when you said it was only 6 feet wide—I mean the big hole?

A. The glory hole?

Q. Yes, how big was that?

A. That would probably be about 14 or 15 feet wide at the time and probably—they just start, you know, it wasn't very big—10 [26—11] or 12 feet deep.

Q. It was 14 or 15 feet wide and how long?

A. About 20 feet long; something like that.

Q. It was something like 15 by 20 feet?

A. Yes.

Q. And how deep?

A. Probably the side where the shaft was was probably 10 feet or 12 feet—I don't know exactly.

Q. You had worked in this hole before that night, had you?

A. I start seven o'clock to work that night.

Q. You had worked before that night?

A. Yes, I work there once in a while; not a great deal.

Q. You started at seven o'clock? A. Yes, sir.

Q. Working in the glory hole? A. Yes, sir.

Q. At the bottom of it?

A. Right at the bottom of it—we shovel right in the shaft.

Q. Was there anyone working with you?

A. Johnny Schmitt was working with me.

Q. Anybody else? A. No, sir.

Q. Was there anybody else working in any part

(Testimony of John Pedrin.)

of the glory hole?

A. The machine drill was working in the side there drilling a hole there, two men.

Q. They were up near the top?

A. Right at the edge of the glory hole, at the top.

Q. What were you doing between seven and eleven o'clock that night? [27—12]

A. We were breaking rock with a hammer and shoveling ore on to the shaft—mucking.

Q. That was your employment during all the time on the first half of the shift, from seven o'clock—what time did you quit work?

A. At twenty minutes after 11.

Q. What did you quit for? A. To go to dinner.

Q. These men that were drilling, were they still at work at that time?

A. No, they quit at the same time—they quit and went to dinner at the same time.

Q. Do you know whether they had put in the powder at that time?

A. They had the powder in—they had a load ready to shoot at the time.

Q. Was it ready at the time you went off to dinner, was it ready to fire? A. Yes, sir.

Q. What time did you return from dinner?

A. Twelve o'clock.

Q. Do you know whether or not they fired that shot in the glory hole while you were gone?

A. Yes, I know they were going to shoot.

Q. Do you know whether they did or not?

A. Well, I know they did shoot.

(Testimony of John Pedrin.)

Q. Did you hear it? A. Yes, sir.

Q. Who was the foreman or shift boss, whichever they call him?

A. Mr. Green was the shift foreman at night.

Q. On the shift starting at seven o'clock?

A. Yes, sir. [28—13]

Q. Were you working under his orders?

A. Yes, I was working under his orders.

Q. Now, after they fire off a shot in that glory hole what do they usually do first?

A. Well, they always give us orders what we have got to do, so that night he gave me orders to go and clear up that shaft and bulldoze that big rock that fell down.

Q. After they fire off a blast in the hole what is the first thing they do—do they do anything about the walls? A. Yes.

Q. What do they do?

A. They just take the loose stuff down, bar down.

Q. How do they do that?

A. They get bars and hammer and wedges, or if they don't, they get some powder, put it in the crack and fire it down.

Q. I understand they go around with bars or hammers and try to break down the loose rock that has been left hanging, that didn't break clear off.

A. Yes, they do that any place I work.

Q. When you came back, did anybody give you any orders? A. Yes, sir, Mr. Green gave me orders.

Q. What did he tell you to do?

A. He told me to go to that shaft 38, where there

(Testimony of John Pedrin.)

was a glory hole, and bulldoze all them big rocks that fell down, that had been shot in there.

Q. What part of the glory hole would that work be in?

A. It was out in the shaft, right in the shaft.

Q. Was it on the side of the glory hole or bottom?

A. Right in the bottom of the glory hole where I have to do that work. [29—14]

Q. Was anybody else put to work with you?

A. No, only Johnny Schmitt was with me. I start to bulldoze—he tell me as quick as I can because he want to get some ore out of there.

Q. Who told you that?

A. Mr. Green—he said as quick as I can because he wanted to get some ore and I start, but he didn't get through.

Q. What happened?

A. I start to put in my bulldoze—I had a can of powder, about six or seven sticks of powder and about thirty or forty primers and I was around there fixing my bulldozes.

Q. Who was with you?

A. Johnny Schmitt was holding the lantern for me.

Q. How much light was there in that glory hole?

A. We only had a lantern.

Q. Was it a dark night or light night?

A. It was dark,—not dark, just medium.

Q. Did you have any light except the lantern?

A. That is all I had, a lantern.

Q. A small hand lantern?

(Testimony of John Pedrin.)

A. Yes, a small hand lantern.

Q. You were bulldozing and Johnny Schmitt was holding the lantern? A. Yes, sir.

Q. Tell what happened.

A. Then I went around and I was pretty near ready to test my fuses—I had about twenty bulldozes all made out, all ready, so I went on my knees to fix up another bulldoze—

Q. Get down on the floor and show the position you were in.

A. I was in this position, like this (indicating), and so he was [30—15] standing like that (indicating), and I was fixing this up to test my shots and he hollered to me, but I had no time to get away.

Q. Who hollered to you?

A. Schmitt—and it hit me between the shoulders and I fell down and I know no more about it until quite awhile.

Q. When you became conscious where were you?

A. I was out of the glory hole.

Q. On the ground somewhere?

A. Yes, up on the ground.

Q. What did they do with you?

A. Well, they helped me up to the hospital.

Q. Where is the hospital?

A. Down toward the beach.

Q. How long were you in the hospital?

A. Well, I don't know exactly. I was there pretty near four months, something like that—I don't know exactly how long. I never took no attention to it.

Q. How long were you in bed in the hospital?

(Testimony of John Pedrin.)

A. Probably about two months.

Q. Now, just tell the jury what injuries you received—tell how you were hurt, every hurt you had.

A. I got a cut in here (indicating).

Q. How big was that cut on the face at the time?

A. They told me it was right to the bone.

Mr. BORYER.—I move to strike that as hearsay—that the answer be stricken and the jury instructed to disregard it.

Motion denied. Defendant allowed an exception.

The WITNESS.—I got this cut in here and I got another cut in here and the doctor told me if it was a little further down [31—16] here it would have killed me, would have touched my heart.

Q. Describe the cut a little more on your left breast.

A. It was right in here—it came just a little above—

Q. Tell what it was like, how deep it was and how big it was.

A. It was about that big (indicating) and it just went right to the bone, to the ribs, and I had this arm broke right in here—I got this muscle all smashed right down here, all smashed—I got no strength at all in this arm, and another thing, I had this rib here—

Q. Describe that.

A. Right in here, right below the chest here.

Q. How long was that cut and how deep?

A. This wasn't a cut; this was just this rib here was disconnected, so the doctor told me. I couldn't

(Testimony of John Pedrin.)

cough or couldn't sneeze or nothing; it pretty near killed me.

Q. Just describe to the jury how you were bandaged.

A. Well, I had that big bandage all around me for probably two months and a half,—something like that.

Q. What was that for?

A. To hold this rib,—it was bleeding—to hold it together.

Q. So it would knit? A. So it would knit.

Q. Were you in bed during all that time?

A. Well, I was in bed part of the time; yes.

Q. This injury to your left arm, about where is it? Describe that as well as you can.

A. Right in here (indicating) and so this muscle is all smashed down.

Q. Was the bone broken?

A. Yes, the bone was clear broke and this muscle all smashed, [32—17] so I never got that muscle back in position—it is all in a lump here in my elbow, so I can't do no hard work—I have got a pain like a rheumatism all the time, so that is all I get hurt from.

Q. You were in bed with your body strapped for about two months and a half as near, as you can remember?

A. I got up once in a while when I get a little better and go back to bed.

Q. You were in the hospital altogether about four months, you think?

(Testimony of John Pedrin.)

A. I think I was there about that long, more or less—I don't know how long exactly because I didn't take no attention to it.

Q. Did you suffer any pain? A. Yes, I did.

Q. Very much?

A. Sometimes I feel that I would be dead better.

Q. Was the pain constant or just now and then?

A. It was pretty hard pains, you know.

Q. From all of these injuries or from only part of them?

A. Yes, all these injuries—I suffered from this cut in here.

Q. Describe it in your own words—just describe how you suffered, as near as you can. The nature of the pain, whether they are shooting pains or anything of that kind.

A. I don't know; there was a pain—it was pretty hard; I don't know.

Q. Did it affect your breathing in any way?

A. Yes, sir, affected my breathing for quite a while.

Q. Does it now or have you recovered?

A. I have recovered, I guess. [33—18]

Q. But for quite a while, was it painful to breathe?

A. Yes, it pains and I couldn't breathe very good.

Q. For about how long?

A. That held me about two or three weeks like that—I couldn't hardly breathe or sneeze.

Q. For how long did you suffer pain from these injuries to your body?

(Testimony of John Pedrin.)

A. I suffered about—pretty near two months, pretty hard.

Q. After that time, after they took the bands or straps off of you, your body was pretty well healed?

A. Yes, sir.

Q. And you didn't suffer much pain after that?

A. I didn't suffer much pain after that, just a little.

Q. How about your arm?

A. My arm I had in a splint about two months—I suffered quite a bit in my arm.

Q. Have you ever ceased to suffer pain from your arm? A. Yes, I have.

Q. You don't understand my question—do you still suffer pain or not?

A. Yes, I suffer pain—my arm is like it was rheumatism pains.

Q. Does that continue up to the present?

A. Yes, it continues up to the present.

Q. Do you remember about what date you came out of the hospital?

A. No, I can't tell the day I came out of the hospital.

Q. About—if it was about four months that would bring it to the last of May—do you think it was about that time? A. I don't remember exactly.

Q. Was it summer when you came out of the hospital? [34—19] A. Yes, it was summer.

Q. Now, what did you do when you came out of the hospital?

A. I was around the camp there shoveling a little snow and doing a little light work around there.

(Testimony of John Pedrin.)

Q. Did they pay your wages after you came out of the hospital? A. Yes, sir.

Q. Do you remember when you commenced to draw wages?

A. I don't remember the month I started; I worked four days of the month—once when I started I was shoveling snow; I think it was in June.

Q. Where were you shoveling snow?

A. Along the track, from the camp to the wharf and they have a sidewalk there along the beach to go to the dining-room.

Q. What other work did you do besides shoveling snow?

A. Well, I was shoveling a little ore in the cars there, cleaning up the bunkers and mucking a little bit down there what there was to do.

Q. Did you work in the mine any? A. No.

Q. How long were you working there after you came out of the hospital?

A. I worked there nearly two months.

Q. Did you draw any wages while you were in the hospital? A. No, sir.

Q. Did you do any hard work down there, any heavy work, after you came out of the hospital?

A. No.

Q. To what extent could you use your left arm in the work you did?

A. I can't use it very much—I use it a little.

Q. In shoveling snow? [35—20]

A. In shoveling snow, things like that—I can

(Testimony of John Pedrin.)

shovel a little, at the same time I can't shovel very steady.

Q. Could you use your left arm in shoveling?

A. Not much.

Q. Do you have to do most of the work with your right arm? A. Yes, sir.

Q. Did it cause you any pain in your left arm where it was hurt to do that shoveling?

A. Yes, it does, when I shovel quite a while.

Q. Now, when did you quit there?

A. I forgot when I quit.

Q. You worked about two months you said?

A. Yes, something like that.

Q. And you probably quit around about the last of July or first of August?

A. Something like that.

Q. What did you do after you quit at Latouche?

A. I came here and have been doing little jobs I can do around here.

Q. You have been in Valdez since you quit there?

A. Yes, I have been in Valdez since I quit there.

Q. What have you been doing around here?

A. I have been working here for Mr. Shafer fixing up his house and once in a while any little job I get around any place.

Q. Have you done any hard work? A. No.

Q. Can you do hard work now?

A. No, I can't do very hard work.

Q. Do you have any trouble in doing work except with your left arm? [36—21]

(Testimony of John Pedrin.)

A. Yes, that is the only trouble I have got, with my left arm.

Q. Your left arm is all that pains you now?

A. Yes, sir.

Q. Your back is strong?

A. My back is strong, yes.

Q. There is nothing wrong with you now?

A. Excepting my arm.

Q. Who else did you work for around here?

A. I worked for Al White, worked in Blum's, out there putting tar on the roofing.

Q. Could you at this time work as a miner, a single jack? A. I can't work now any.

Q. Why can't you?

A. Because I can't hold the drills. I couldn't hold the drill to hit it—I can't stand it the way it is.

Q. What is the highest wages you ever drew in Alaska as a miner? A. \$3.50.

Q. Where was that?

A. Over on the Iverson property.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Mr. BORYER.)

Q. What wages were you drawing when you were working for the Beatson Copper Company?

A. \$2.50 and board; that would be \$3.50.

Q. Two dollars and a half and board?

A. Yes.

Q. When did you start working there, do you recall?

A. No, sir, I don't recall when I started to work

(Testimony of John Pedrin.)

there—I [37—22] never took no pains about the time at all.

Q. You went down to Latouche some time in November? A. Something like that.

Q. 1912? A. Yes.

Q. Do you know what part of November?

A. No, sir, I don't know.

Q. Was it the early part or latter part of November?

A. Well, I think it was about the middle of November, something like that—I am not very sure what time.

Q. Where did you go from?

A. I went from Cordova.

Q. How long had you been in Cordova?

A. I was there a couple of weeks at that time.

Q. You were in Cordova then about two weeks?

A. Yes, sir.

Q. Before you went down there? A. Yes, sir.

Q. What were you doing in those two weeks?

A. I came up from the line and I was stopping there waiting for a boat to go out, anywhere, and the first boat that came in I came up to Latouche.

Q. You stayed there two weeks waiting for a boat?

A. Yes, sir.

Q. And you took the first boat out? A. Yes, sir.

Q. How long after you had gotten to Latouche was it before you went to work?

A. Well, I stayed around there, I guess, a couple of weeks. I don't know exactly how long it is—I didn't get a job right [38—23] away there, and

.(Testimony of John Pedrin.)

I stayed at that place that Johnny Wild has there for a time—I don't know exactly how many days I stay out of work. I stay quite a few days.

Q. Did you start to work before Christmas?

A. Yes, I worked before Christmas.

Q. How long before Christmas?

A. Probably it was about a month I guess. I don't know exactly—I don't know how long.

Q. You were in Latouche about a week before you began work; is that right?

A. No, I can't tell exactly,—I think it was over a week.

Q. About two months?

A. Yes, something like that,—I don't know exactly how many days.

Q. About two months, you think?

A. Yes, sir, about something like that.

Q. What were you doing those two weeks?

A. I was doing nothing—I had nothing else to do there but waiting for a job.

Q. Where were you staying?

A. Staying in Johnny Wild's place.

Q. Whose place is that?

A. Johnny Wild is a man has a saloon there and rooming-house and was running kind of a little hotel and I was stopping with him.

Q. Did you apply for a job when you went there?

A. Yes, sir, the first thing.

Q. What kind of a job did you apply for?

A. I asked for anything they could give me.

Q. Did you tell them you were a miner? [39—24]

(Testimony of John Pedrin.)

A. I told them I was a good single jack and hammer-man, that is all.

Q. You allege in you complaint that you are a miner, a competent miner, capable of earning the highest going wages; is that correct?

A. Well, I am a miner. I said I was no machine-man and all that, but I say I am a miner in this way—I am a hand miner with a single jack or double jack, anything like that. I can drive a tunnel; I can work in any of the mines.

Q. You are familiar with the general work around mines? A. Yes, sir.

Q. And you have done all that kind of work?

A. Yes, sir.

Q. Where?

A. In California and here, when I get a show. Here in Alaska it is all the same wages—\$3.50. A mucker gets just the same as a miner where I have been working.

Q. You have done such mining work as bulldozing?

A. Yes, sir.

Q. And mucking? A. Yes, sir.

Q. And barring down walls?

A. Yes, I have done all that kind of work.

Q. And you are generally familiar with mining work? A. Yes, sir.

Q. Work that is conducted around a mine?

A. Yes, sir.

Q. Did you tell them that when you went there and applied for a job?

A. I applied for a job—I didn't tell them I was a

(Testimony of John Pedrin.)

miner when I [40—25] start; I say I will go to work and I will get a miner's job when I am acquainted with the job, and I asked him just for a job and he refused me a job and told me maybe after a while, to wait; there was four fellows, we were together, and he put the other three fellows to work except me.

Q. And then you began to work there about two weeks after you had arrived at Latouche?

A. Something like that.

Q. Which would be somewhere around the first of December, 1912? A. Yes, sir.

Q. What work did you start to do there?

A. Mucking, wheeling ore around to the shaft.

Q. What do you mean by mucking?

A. Priming rock, shoveling ore in the wheelbarrow and throwing it in there.

Q. To be taken over to the bunkers, from the level down to the bunkers? A. Yes, sir.

Q. This ore was shot down, was it?

A. They put in a shot once in a while—there is a big bluff and they put a shot there and we had to muck there sometimes two weeks before we got through with it, probably more.

Q. Then you put a shot in and the ore and dirt would fall down? A. Yes, sir.

Q. And after it would fall down, you as one of the muckers would shovel this ore into the car or into the shaft? A. Yes, sir.

Q. Which would be taken from there to the bunkers? A. Yes.

(Testimony of John Pedrin.)

Q. And from there it would be shipped to the mills, is that correct? [41—26] A. Yes, sir.

Q. What part of the mine did you start to work in when you began your work? A. When I start?

Q. Yes.

A. I was way down in California.

Q. I mean when you started working for the defendant corporation, the Beatson Copper Company.

A. Right in the bluff.

Q. About the same place where you were hurt?

A. No, not exactly.

Q. I mean it was around that same hole?

A. Yes, around the same place there, right in the bluff.

Q. How long did you work in that glory hole?

A. We never work steady; some time they come and put me another place and sometimes they put me there—we never had a man steady except the machine-men.

Q. Where else would you work?

A. All over the bluff where they put me; sometimes they put me shoveling snow down there; sometimes we were wheeling ore in the cars, doing any work—shoveling.

Q. What other kind of work were you doing?

A. That is all the work I do there the time before I was hurt just mucking—

Q. And shoveling snow? A. Yes.

Q. And breaking down ore?

A. Yes, breaking rock, big chuncks of ore—we

(Testimony of John Pedrin.)

would break up the rock so they don't block up the chute.

Q. Then all of your work from the time you began there to the [42—27] time you were injured was in and around this particular glory hole in which you were injured, was it not?

A. There was a lot of snow around there.

Q. Let me see if I have a correct impression there. As I understand it, there is a large glory hole there, is there not? We will call it a pit instead of a glory hole.

A. They give it the name the glory hole at the time they start it.

Q. Is there not a big pit there, about 300 feet wide and 50 to 80 feet long, a big pit?

A. Yes, alongside of the glory hole.

Q. Now, then, in this pit there is a glory hole?

A. The wall of the glory hole came to that pit and to that shaft.

By the COURT.—Ask the witness if he knows what is meant by glory hole.

(By Mr. RITCHIE.)

Q. You know what a glory hole is?

A. I understand a glory hole is just a hole—

Q. Had you ever seen them in other mines?

A. No, I never work before in a glory hole.

Q. You never worked in the Treadwell?

A. No.

By the COURT.—Isn't a glory hole supposed to be a big open cut or quarry as distinguished from a shaft or tunnel or vein—isn't a glory hole supposed

(Testimony of John Pedrin.)

to be a large pit or quarry in the rock and is blown down from the sides like the glory hole at Douglass?

Mr. RITCHIE.—Yes, that is my understanding. I suppose it will be more fully explained by Mr. Van Campen after a while. [43—28]

By Mr. BORYER.—At the time you were injured you were working down in the hole?

A. Yes, I was working in the hole.

Q. About what was the size of that hole?

A. The hole I was working in—I can't tell how big it was.

Q. Wasn't it at that time about 40 feet long and 25 to 30 feet wide? A. At that time?

Q. Yes. A. I don't know.

Q. Approximately what was its size at the top?

A. I never took no attention to that, because I was just working—I never know how wide it was or how long.

Q. You know what 40 feet is, don't you?

A. Yes, sir.

Q. Would you say that it was about 40 feet wide or long?

A. Well, I can't tell, because I never took no judgment about it—I never took no attention to how long it was or how wide it was or how deep. All I know that thing sloughed on top of me ten or twelve feet deep.

Q. It was about ten or twelve feet deep?

A. Yes, sir, where the stuff fell, where I was.

Q. You didn't see the stuff fall?

A. No, I didn't see it.

*(Testimony of John Pedrin.)

Q. You say you worked up at Gray's mine—how long did you work up there?

A. I worked about a month and a half in that place

Q. What were you doing up there?

A. Well, I was driving a tunnel for a while and then we start to make a trail, to fix up the trail, so we could haul stuff up—they were putting a tramway there at the time and [44—29] we were making a trail to the bottom of the glacier.

Q. Who was helping you to drive this tunnel at Gray's?

A. There was several fellows—there was two of us driving at a time. There was three of us, my partner's name was Murphy.

Q. And what work did you do?

A. Drilling—we were drilling there.

Q. Would you help load the holes?

A. Yes, I do several times, and load them myself.

Q. And then you helped to shoot them?

A. Yes, one time he come up and I touch the fuse—one stay down and shoot it and the other come up—there was a kind of raise and then there was a tunnel there and we were driving another crosscut.

Q. Now, then, after you quit that tunnel work there, you went to work for Iverson, did you?

A. No, I worked before for Iverson, before I went up there.

Q. What were you doing for Iverson?

A. We were driving a tunnel.

Q. Who was helping you there?

(Testimony of John Pedrin.)

A. A fellow named—I don't remember his name right now.

Q. Just one man?

A. Well, we were two driving and one mucking the stuff out.

Q. Who was doing the driving?

A. I and the man that I don't remember his name now, a Swede fellow.

Q. You two would do the drilling and the loading and the firing of the shots? A. Yes.

Q. How long did you work there? [45—30]

A. I worked there about a month and a half or two months, something like that.

Q. In driving that tunnel? A. Yes, sir.

Q. Then you had driven tunnels at Gray's and at Iverson's, had you?

A. Yes, sir; I didn't work very long at Gray's on the tunnel. I probably worked two shifts in that tunnel and then I went to make that trail—stopped the mining work and went to work to get the trail ready for the winter, so they could haul the stuff on the sleighs.

Q. Now, in your direct examination you said you were getting three dollars and something and board—as a matter of fact, you were only getting two dollars and something and board?

A. I never got more than \$3.50 and pay board out of it.

Q. That is, you paid your board out of it?

A. Yes, that leaves me \$2.50.

Q. How long had you been working in this partic-

(Testimony of John Pedrin.)

ular pit, the glory hole as you call it, before this time that you got injured?

A. That night I went to work in there; sometimes I work every shift a couple of hours and then they get me out to shovel snow and go some place—I never stay there except that night—I stayed from seven o'clock to the time I got hurt.

Q. You had been working in that particular pit or glory hole some time, had you?

A. Several days—I go to work there when they put me to work there; yes, sir.

Q. You had worked in there off and on, had you, from the time you began working for the Beatson Copper Co.? [46—31]

A. No, because I start that way after I go to work—they had a fellow drilling there when I was mucking the bluff—they had two fellows drilling there by hand.

Q. But you were working in and around there?

A. I was working around that.

Q. All the time—ever since you have been working in the mine?

A. Until I got hurt, around there; yes.

Q. Where were you working the night before you got hurt? A. I was working right in the pit there.

Q. Right in that same pit?

A. Yes, right in that same pit.

Q. Did you work a full night's shift?

A. We worked from seven o'clock until 11:20 and we go to dinner and come back 12 o'clock and are supposed to quit four o'clock in the morning.

(Testimony of John Pedrin.)

Q. That is what you call a full shift?

A. That is what we call a full shift there; yes.

Q. You were working the night shift, were you?

A. At the time I was hurt? Yes.

Q. The night before you got hurt, were you working the night shift?

A. Yes, I was working night shift.

Q. In that same place, the same pit?

A. Yes, sir.

Q. The night before that where were you working?

A. I was working around the pit and bluff.

Q. The same place?

A. The same place—I worked there two weeks.

Q. And you worked a full night shift?

A. Yes, sir. [47—32]

Q. And the night before that—four nights before you got hurt—were you working in the same place?

A. I can't say in the very same place—I was working there.

Q. But you were working in that same pit or glory hole?

A. Maybe I wasn't in the glory hole—around the bluff, or any place they send me; sometimes they send me around the mine to do something.

Q. Four nights before that do you know where you were working?

A. I can't tell where I was working. I was working there for the same foreman, anyhow.

Q. Do you know where you were working?

A. I was working around the bluff somewhere.

Q. Were you working in that place?

(Testimony of John Pedrin.)

A. Yes, I was working in that place; yes, sir.

Q. And how long had you been working in that place, about how long? A. Night shift?

Q. Yes.

A. That was my last night shift—that was Saturday night; I was working two weeks in January.

Q. Then had you been working there about two weeks in that same place?

A. Yes, sir, about the same place, around the bluff there and the mine.

Q. Had you worked for about two weeks in that same pit or glory hole?

A. Well, not exactly—sometimes they send me to the blacksmith-shop to do some work, or to shovel or clean the track or something—send me to go and do something in the mine and I would go back and go to work shoveling snow or ore or [48—33] muck or whatever it was.

Q. But your general work was right in that pit or glory hole? A. Yes, sir.

Q. Now, that is correct, is it—except when they would send you out to get some tools sharpened to the blacksmith-shop or something? A. Yes.

Q. What kind of work did you begin to do when you began working in that pit or glory hole—the place where you were injured?

A. When I start to work the first time?

Q. Yes.

A. I start to break ore with a hammer and shovel down the holes or shaft.

Q. How is that?

(Testimony of John Pedrin.)

A. Breaking down with a sledge-hammer and shoveling it to the shaft and dump it—that's all.

Q. And that was the ore and dirt that had been shot down, was it?

A. Yes, we shot it down; yes, sir.

Q. You were familiar with and knew the conditions around there in this pit, did you?

A. Well, I know the condition, yes; when we were working there.

Q. And you could see the conditions there all the time, could you?

Mr. RITCHIE.—That is not a fair question—the evidence already discloses that the conditions must have been changing from time to time. We object to it.

Objection overruled. Plaintiff allowed an exception.

Q. You were around there for two weeks doing general work, were you not, in this pit? [49—34]

A. Yes, I was working around.

Q. And could see what you were doing?

A. Not exactly; you couldn't see what you were doing because there was a lot of snow and ice around there.

Q. You could see the snow and ice and could see the conditions, could you not?

A. You could see the ice and snow, yes—you could see that.

Q. And you knew the conditions around there during those two weeks?

A. No, they were shooting there and working there

(Testimony of John Pedrin.)

all the time. That is all; I only was a mucker.

Q. Now, then, who fired this shot just when you quit work *to dinner* this time?

A. A fellow they call Conine.

Mr. RITCHIE.—Do you know yourself—did you see him fire it? A. No, I didn't see it fired.

Q. Where were you when he fired?

A. We went to dinner—a little house they had there for the lunch; they had a little building built there so we could go to dinner there.

Q. He went to dinner with you?

A. He didn't go with me; he went right after, some time after he got through; he went to eat there, up there in the same place.

Q. You saw him drilling the hole?

A. I saw him working there, working the machine there; yes.

Q. You say he fired the shot there—did he tell you he was going to fire the shot?

A. No, he never told me anything.

Q. Did you hear the shot fired? [50—35]

A. There was quite a few shots shot there, because I *had quite* a few myself.

Q. But after you quit work to go to lunch, did you hear him fire the shots? A. Fired several shots.

Q. You heard him fire several shots? A. Yes.

Q. And you knew they were fired in there?

A. Yes, I knew they were shooting; yes, sir.

Q. Who went to dinner with you?

A. The whole bunch that was working there.

Q. Everybody that was working in that pit?

(Testimony of John Pedrin.)

A. Yes, sir.

Q. How did you go? A. We walked up there.

Q. Did the powder-man go to dinner with you?

A. Well, we all went to dinner—there was no powder-man there at night-time; he makes the hole—the same machine-man loads his hole and fires it.

Q. The fellow who fired this shot, did he go to dinner with you?

A. Well, he didn't went right away with me—I went ahead.

Q. How far ahead were you?

A. I can't tell you, because we were all eating there; one was working a little away, a little distance further along, but we all go—I can't tell you how long.

Q. When you went back after dinner, who went with you?

A. We all went back, the whole bunch, and then Mr. Green gave us the orders what we are to do.

Q. How many were there of you? [51—36]

A. I don't know how many there were. I never counted them.

Q. Did Mr. Green go clear back with you, back to this pit?

A. Yes, he stand right at the edge of the glory hole.

Q. Standing on the edge of the glory hole?

A. Yes, sir.

Q. And what had you been doing just before dinner?

(Testimony of John Pedrin.)

A. We were breaking rock and shoveling down to that 38 place.

Q. What did you do directly after you came back from dinner, what was your first work? The same kind of work, was it?

A. He came and told me to get at that bulldozing as quick as I could, because he wanted the ore. "Johnny," he said, "I want you to go as quick as you can and get those big boulders cut down."

Q. What had you been doing just before dinner—had you been bulldozing?

A. Yes, I bulldoze before we went to dinner. I bulldoze some little rocks there.

Q. And you continued your bulldozing as soon as you came back?

A. Yes, he gave me orders and I went after the powder right away after dinner.

Q. You went to dinner—this shift boss didn't tell you to stop bulldozing, did he, when you returned?

A. No, sir, he didn't tell me to stop.

Q. And that was the work he had set you to do in the morning? A. Yes, sir.

Q. And when you came back after dinner, you went and continued this same work you were doing in the morning, did you not?

A. I was bulldozing, yes, when I got hurt.

Q. Now, you were injured on the 25th of January, were you not, instead of some time in February, as you allege in your complaint? [52—37]

A. Well, I can't tell what date it was, because I don't remember exactly.

(Testimony of John Pedrin.)

Q. Now, you quit work on the 26th—the time sheet shows the time you quit work, January 26th. I presume that is the time you were injured.

A. It might be that day; I can't tell; I don't remember.

Q. You don't know whether that is correct or not?

Mr. RITCHIE.—I don't dispute your record—it is undoubtedly correct.

Q. Now, you remained in the hospital, then, during the month of February, did you not?

A. Yes, I was in the hospital.

Q. All during the month of February?

A. Yes, sir.

Q. And four or five days during January?

A. I was in the hospital—I don't know how long.

Q. Now, then, didn't you begin work again on the 25th day of March?

A. That might be—I did a little work, I don't know exactly whether it was the 25th of March. I just started to do a little work around there; I don't know exactly what month it was. I never took no attention to it.

Q. I hand you defendant's pay-roll for the month of March, 1913, and ask you if you did not draw a check for work that month so that you were entitled to \$12.85. I ask you if that is not your signature.

A. That is my name.

Q. That is your signature?

A. That is my name, yes.

Q. Did you write that? [53—38] A. I did.

Q. You did write that? A. Yes.

(Testimony of John Pedrin.)

Q. Then you must have gotten a check for that amount for March, did you not?

A. The first money I got when I started to work was \$4.00 and some odd cents in cash.

Q. But you had worked and earned \$12.85, had you not?

A. At that time I was still in the hospital and I just went out and shoveled a little snow around by the track.

Q. Then you did work during the month of March?

A. Yes, if it is there I did.

Q. And you admit that is your signature there and you signed that?

A. Yes, I signed it, yes, sir.

Mr. BORYER.—These are the pay-rolls of the company, that they use in keeping their accounts, and I would like to ask permission to show this to the jury and if counsel hasn't any objections, to withdraw it.

By the COURT.—You had better submit it to Mr. Ritchie.

Mr. RITCHIE.—I am perfectly willing to admit that if plaintiff's signature is on this pay-roll that he received pay to the amount which his signature indicates for that month. I don't admit he did any work to get that; it might have been a gift to him, but I admit he received that under the name of wages.

By the COURT.—Read into the record then the dates and amount.

Mr. BORYER.—(Reading.) Name, John Pedrin; occupation, mucker; three days and six hours;

(Testimony of John Pedrin.)

rate \$3.50 per day; amount, \$12.85; store deduction, \$3.85; board, \$4.00; hospital, 40 cts.; total [54—39] deduction, \$8.25; balance due, \$4.60; cash, \$4.60; signed under signature John Pedrin. Month of March, 1913. This is the pay-roll of the company for the month of March, 1913.

Mr. RITCHIE.—The plaintiff admits that the pay-roll of the defendant corporation for the month of March, 1913, shows the charges and credits for and against John Pedrin, the plaintiff, as read by Mr. Boryer into the record.

Q. I show you pay-roll of the defendant corporation for the month of April, 1913, and ask you if you did not do work during that month for which you earned \$63.40, and I will ask you if that is not your signature, on the same line across from that amount? A. Yes, sir, that is my name there.

Q. And you signed it, did you?

A. Yes, sir, I did.

Q. And you received and did work during the month of April, 1913, to the extent of \$63.40; is that correct? A. All I received was \$19.30.

Q. But you did work which entitled you—

A. Yes, that is the time they gave me; I was monkeying around shoveling a little snow from the track with one hand.

Mr. RITCHIE.—We object to Mr. Boryer stating to the witness that he actually received that; we will admit what the record shows and I don't think there is any doubt about the fact, but I don't want the plaintiff to be forced to admit it.

(Testimony of John Pedrin.)

Mr. BORYER.—You admit the amounts and distribution on the pay-roll is correct; as it appears there?

Mr. RITCHIE.—No, but I admit that the pay-roll for the company for that month shows as you have read it or will read it and that he, the plaintiff, admits that is his signature in [55—40] the usual place on the pay-roll and let the pay-roll go for what it is worth.

Q. I see from this pay-roll, designating you as doing mucking work, in which you worked eighteen days and one hour; for which you were to receive \$3.50 a day, and that the total amount of that was \$63.40, from which there was a store deduction of \$22.10, board \$20, hospital \$2; total deduction, \$44.10—balance due, \$19. 30; is that correct?

Mr. RITCHIE.—We object to the question unless the plaintiff personally remembers this. I shouldn't think this was necessary. I have no doubt they can prove those payments were made by Mr. Van Campen and we will not dispute it—I don't want the plaintiff, however, forced to make admissions as to a matter of charges and credits there which he doesn't remember.

By the COURT.—The objection will be overruled; the witness can state whether he remembers or not and if he doesn't remember he can so state.

(Plaintiff allowed an exception to the ruling.)

Q. As a matter of fact, you did work during the month of April, 1913, 18 days and one hour—did you or did you not?

(Testimony of John Pedrin.)

A. I don't know. I was working there, monkeying with one hand and whatever they gave me, I took it. Sometimes I worked a couple of hours and knocked off and sometimes I worked half a day around there with a shovel, shoveling snow, and would go to the bunk, I couldn't stand it, and Mr. Van Campen told me if I couldn't stand it to lay off. I never took track of my time. I took what they told me is right.

Q. Then you don't know if you worked 18 days and one hour or not, do you?

A. No, sir, I don't know if I did, because they just gave me the [56—41] time—I guess it was right, when I was monkeying around with one hand.

Q. And you may have worked 18 days and one hour, may you not—it is possible you did do it, is it not?

A. I didn't do much work; it was with one hand, shoveling the snow. Sometimes I worked a couple of hours and sometimes one and sometimes five and knocked off, and I never took track of the time I worked—the time they gave me I took.

Q. I will ask you this question: I believe you stated on your direct examination that you were confined in the hospital for four months and didn't do any work during those four months. Now, I will ask you if that is correct or not.

A. I was walking around and doing a little work—for four months, I say, I don't remember just how long I stay in the hospital—he ask me and I say three months, more or less.

Q. Then you didn't want the jury to believe that

(Testimony of John Pedrin.)

you were in the hospital four months?

A. What I said—I said I didn't know exactly how long I stay in the hospital, and that is the truth. I said that before.

Q. Now, then, I show you defendant's pay-roll for the month of May, 1913, and ask you if you didn't do work and draw a check and was entitled to the amount of \$100.35? That is your signature, is it not? A. That is my name there.

Q. Did you sign it? A. I did.

Q. Now, then, this pay-roll shows you as laboring under the head of a mucker for 28 days and 6 hours at \$3.50 a day, the total of which amounted to \$100.35. Now I will ask you if that is correct: [57—42]

A. It might be correct.

Q. You signed for that as being correct, did you not—that is your signature, I believe—you admit that? A. Yes, sir.

Q. Now, I will ask you what you were doing during the month of May.

A. I do so many things I can't tell you exactly what I was doing—I was doing anything that came along.

Q. Was that light work also?

A. Well, I went down to the assay office and helped the engineer down there for a while, to do any little things that came along there, untie the cars, etc.—I didn't know anything about that work, but they put me in there and I worked there a while; it was light work.

(Testimony of John Pedrin.)

Q. Tell the jury what work you did there in the assay office.

A. I was just grinding the ore, taking the samples for the engineer and helping him—anything he told me to do, helping him assay, something like that. I don't know what part of the month it was or what day it was when I started there.

Q. That was when you were doing your work?

A. Yes, I always do light work there when I was working there and I have been doing light work since because I can't work hard,—would go to the ore bins and get samples.

Q. You would go to the ore bins and get samples?

A. Yes.

Q. You would get those samples in sacks, would you?

A. Yes, small little sacks; sometimes I take little pieces of rock and put it in the sacks and take it to the assay office and put it through the machine—all I had to do was to start the machine and put the ore through. [58—43]

Q. How large were the sacks?

A. They weren't full,—a little sample from each car; they sometimes take a little piece of rock and throw it in the box from each car as they come from the shift. Take little samples and they put them in a box and I take them in a little sack, ore sacks, put them in there and take them to the assay office.

Q. Is that what you were doing during the month of May?

A. I don't know exactly whether I was there in the

(Testimony of John Pedrin.)

month of May or not—I went to work there,—I was working outside in the camp cleaning up and one day Mr. Van Campen told me to go and help the engineer do that and I don't know which day it was, or which month it was, but I went.

Q. Did you do any heavy work before you left there? A. No, sir.

Q. Didn't do any? A. No.

Q. All of it was light work?

A. Yes, all of it was light work that I could do.

Q. Do you remember during that month, during the month of May, that you were helping load from the dock over fifty tons of coal, put it in cars and pushed those cars to the place where the coal was stored, and during that time your cars would get off the track and you would help to lift those cars on the track?

A. Yes, I do, with one hand—I didn't do anything with my broken arm, I just helped; there were two men on the car and I pushed all I could with my one arm.

Q. Are you right-handed naturally or left-handed?

A. I am right-handed, so I can do a lot of work with my right [59—44] hand, but I can't do anything with my left hand.

Q. Then you did help to load those fifty tons of coal, put it into the cars and helped to take it to the storage point and there discharge it?

A. Well, yes, I helped the man all I could with one hand.

Q. You and another man did the work?

A. Yes, sir.

(Testimony of John Pedrin.)

Q. Who was that other man?

A. It was a man they called Griff.

Q. As a matter of fact, didn't you use both hands in that work?

A. Well, I used what I could to steady, get hold of it with a shovel. I said I could shovel a little with my hand and I did—I said that from the start, I could handle it, but after that I suffer. You know a man who is broke has to get along the best he can like I have been doing around here in Valdez, doing a little work. I do the best I can to live because I don't want to go begging to anybody—I don't want them to think I am begging.

Q. Then you worked all that month?

A. I worked there some time,—I don't know whether it was a month or not.

Q. And didn't you also work about six days during that month loading ore?

A. Taking a sample from the car when they came and touching the switch with one foot, changing the switch—that is all I did loading ore.

Q. Didn't you also assist in handling the freight from the boats during that month?

A. Yes, sir, I handled the lightest stuff I could handle, because they told me a light box I could handle with one arm [59½—45] like that (indicating)—I do the best I could with my hand.

Q. Now, then, I show you defendant's pay-roll for the month of June, 1913, and ask you if that is your signature and you signed it.

A. That is my name; yes.

(Testimony of John Pedrin.)

Q. You signed it?

A. Yes—for the month of June.

Q. On which pay-roll you are designated as a laborer and worked thirty days and five hours, for which you were entitled to \$107.20 at the rate of \$3.50 per day—is that correct? A. It might be correct.

Q. You don't dispute it, do you?

A. No, not for the month of June—it is all right for the month of June.

Q. Now, then, during that month what kind of work were you doing?

A. In June, that is the time I remember I was working in the assay office with that fellow.

Q. You were also handling freight, were you not?

A. Once in a while I would go and give a hand when Mr. Van Campen told me what I could do.

Q. And you were also working on the wharf, were you not?

A. Once in a while shoveling the snow or shoveling a little coal or cleaning up a little bit, or cleaning up the ore that fell in the tracks there.

Q. I show you defendant's pay-roll for the month of July, 1913 and ask you if that is your signature?

A. Yes, that is my signature.

Q. And you signed that? A. Yes, sir.

Q. And that was for wages due you for the month of July under [60—46] the designation of laborer, was it not? A. Yes, I was working there.

Q. In which month you worked thirty days and one hour and were entitled to \$3.50 per day, the total of which is \$105.45—is that correct?

(Testimony of John Pedrin.)

A. Yes, sir.

Q. Now, then, what were you doing during that month?

A. I was working in the assay office.

Q. You were working in the assay office then?

A. Yes, sir.

Q. Didn't you assist in the general loading of ore during that month?

A. When I go to the wharf I just go and tend switch when they are running the cars, that is all I do, and take samples.

Q. Now, you left there the first day of August, did you not?

A. I don't know whether it was the first day of August or not—I quit some time like that, but I don't know exactly what time I left.

Q. You worked one day in August, did you not, eight hours? A. Something like that.

Q. Then where did you go?

A. I came to Valdez—there wasn't any boat. I waited for the boat to come and when the boat came, I came up here.

Q. You stated here this morning in your direct examination that you had worked a short time for Mr. Al. White and Mr. Blum and Mr. Shafer?

A. Yes, sir.

Q. Is that the work you have been doing since you have been here?

A. I have been around and doing what little work I can; sometimes [61—47] I work for the doctor that is dead now—I work for him sometimes a couple

(Testimony of John Pedrin.)

of hours, and doing what I could.

Q. Just doing light work?

A. Light work, sometimes—I have been doing a little, what I can do with my hand. When a man goes to work he has to do what he can, if he don't, he don't get anything. If I had any money or anything to stay on, I won't work until this arm of mine gets a little better.

Q. What kind of work did you do for Mr. White?

A. I was working for a plumber, helping the plumber, with a pipe and sink, just holding the candle once in a while for him, etc.

Q. What else?

A. That is all I do for him, and I go around there and set pins once in a while there and make a couple of dollars once in a while.

Q. Set pins in the bowling-alley?

A. Yes, hold the pins with one hand and put them up there.

Q. How long were you doing that?

A. Any time I get a show.

Q. What kind of work were you doing for Mr. Blum?

A. When I work for Mr. Blum we were putting tar on the roof.

Q. Tarring the roof?

A. Yes—I was helping, holding the paper and throwing gravel on it.

Q. What kind of work did you do for Mr. Shafer?

A. I chopped a little wood and do a little around that house; he was moving and cut a little kindling

(Testimony of John Pedrin.)

wood once in a while.

Q. What kind of wood were you chopping?
[62—48]

A. Inch boards, sawing with a saw there, inch boards and little blocks and old boards there piled up.

Q. Did you ever do any work down at the dock?

A. Yes, I have been doing a little work there once.

Q. What kind of work were you doing down there?

A. Well, once I was just tipping that bucket there—taking the rope off and let it dump.

Q. You mean the bucket on the ship?

A. Yes, I have been once or twice there—I can't stand that work. I could work there all the day but I couldn't stand it,—I had to lay off once two days with my arm.

Q. Did you ever do any handling of coal down there?

A. We were sacking coal once there; that is all I did there.

Q. Weren't you piling coal also? A. No, sir.

Q. You were not? A. Piling coal?

Q. Yes.

A. No, sir—the only thing I was doing there was helping the fellow lower the car—I get hold and load the truck—I was helping load their trucks.

Q. Load them with what?

A. Load them with anything that came from aboard the ship, freight or anything—get hold of it with my hand, what I could.

Q. Didn't you ever work on longshoring work down

(Testimony of John Pedrin.)

there, in which you were piling sacks of coal in the warehouse?

A. I was trucking—I wasn't piling no coal in the warehouse.

Q. You didn't pile any coal in the warehouse?

A. No, I was trucking coal from one warehouse to the other. [63—49]

Q. Did you ever assist in sacking coal down at the warehouse? A. Yes, I was sacking coal.

Q. Now, do you mean to tell me that you never did any work down at the warehouse in which you were piling sacks of coal in the warehouse?

A. No, sir, we were not piling coal in the warehouse—I was trucking; there was four fellows working, one was loading and two were piling the coal—I was with the truck.

Q. You were just using one truck, were you?

A. No, I think three trucks.

Q. Which trucks did you have?

A. I had one of the trucks with two wheels.

Q. And where were you wheeling this coal from?

A. From one warehouse to the other.

Q. Would you load your own sacks?

A. No, there was a man there loading.

Q. And you would truck it over? A. Yes, sir.

Q. Did you ever work for Mr. Deiringer?

A. I don't know him—I might have worked for him but I don't know his name.

Q. Did you ever do any work in the town here, taking piling, 6 by 8 by 10 feet long off the scow?

A. Yes, I was helping with that, yes, sir; of

(Testimony of John Pedrin.)

course that is light lumber, and I could hold with one hand and steady it with one and get hold of it—I am strong in my right hand and can lift pretty good; I must do the best I can—you know I don't want to go hungry and I don't want to go begging.

Q. You consider a tie 6 by 8 inches by 10 feet long is something [64—50] light do you?

A. I can lift it up by one hand pretty good.

Q. Do you know the weight of those ties?

A. No, I can't tell you the weight of them because one is lighter than the other.

Q. Have you any idea? A. No.

Q. That was the approximate length of those ties, was it not?

A. I don't know how long ties they were; we didn't have to lift them; two men throw them on top and I get hold of one end and we walk right along with it, with my hand—that is all we had to do and we took them a little ways; they are piled up on the wharf. The scow is alongside here and two men throw up, throw it up, from the scow—some of them were 20 feet long, some of them, and I pick it up with one hand and take it and walk away—one in each hand two men.

Q. Did you ever do any work on the Sampson?

A. Yes, I did.

Q. What kind of work did you do there?

A. I was in the holds, shoveling a little coal once—I worked once there with coal and once hooking the net and lowering a little when it was throwing freight on the wharf.

(Testimony of John Pedrin.)

Q. Did you ever work on the Sampson? Did you help discharge freights from the Sampson here and then go from here to Ft. Liscum and help discharge coal there? A. Yes, I did.

Q. And then go on down to the mine and discharge there?

A. We went from this wharf,—we went down to the Cliff and from the Cliff to Fort Liscum and then we came up here.

Q. What were you doing? [65—51]

A. They had sold the coal and I was shoveling coal,—that is the time I had to lay off two days; I thought I could do it but I went over my limit and I had to lay off two days—I couldn't hardly move my arm.

Q. You worked about fifteen hours?

A. I didn't work there long; they gave us straight time, from when we left here, when we started.

Q. How many tons did you unload at the Cliff mine?

A. I don't know, I can't tell—I didn't inquire how many tons.

Q. How long were you working at the Cliff mine?

A. I don't know how long it was; we stayed quite a while; I couldn't say exactly the time when we got up there and when we started and when we finished.

Q. How long were you working over at Liscum?

A. Well, we stayed there, I don't know how long we stayed there—I can't tell you how long we stayed there.

(Testimony of John Pedrin.)

Q. What were you unloading there?

A. We unloaded some coal.

Q. Have you any idea how much? A. No.

Q. How many of you were working there?

A. There was a bunch—the sailor crew and some longshoremen, a big bunch.

Q. Now, I believe you stated that you went to work about 7 o'clock in the evening and worked up until 11:20?

A. I don't know what time we quit work—we went to work seven o'clock some time.

Q. During that time you were working in this hole or pit, in which you were injured—who was working with you in there?

A. Some of the boys, I can't tell you the names; I don't know. [66—52]

Q. How many?

A. I didn't count them—I don't remember—the sailor crew and some longshoremen, I never counted them.

Q. You misunderstand my question. I am speaking about the time you were hurt—you went to work that evening on the night shift at seven o'clock?

A. Yes, sir.

Q. And you worked during that night up until 11:20? A. Yes, sir.

Q. And then you started for your lunch or dinner?

A. Yes, sir.

Q. Now, who was working in this pit with you from 7 o'clock until you left for your dinner at 11:20?

A. The fellow working with me was Johnny

(Testimony of John Pedrin.)

Schmitt—we were working together there, in the same place.

Q. Who else was working in that pit?

W. Well, there was some fellows, I can't tell you their names, I don't know them—the only man I know his name is Albert, that is the only name I can tell you was there, the rest of them I don't know; I don't know the names.

Q. Wasn't Schmitt working with you at that time?

A. Johnny Schmitt was working with me—that was the fellow working with me.

Q. And Albert was working in there also?

A. He wasn't working there; he was working in the pit; he was shoveling—shoveling snow out.

Q. Who else was working there besides you and Schmitt? A. The machine-man and his helper.

Q. What was he doing in there?

A. He was drilling. [67—53]

Q. Had they been drilling in there from seven o'clock until the time you left?

A. They didn't drill all the time—he got through with his drilling and loading so they could fire at dinner-time.

Q. What did he load it with?

A. With powder and fuse and caps.

Q. And he loaded before he started for dinner?

A. I can't tell you—I didn't watch him.

Q. You saw him working there?

A. Yes, I was around there.

Q. Now, then, who else was around there?

(Testimony of John Pedrin.)

A. Well, I don't know who—there was some fellows working in shifts; I don't know their names and don't know them, so I can't tell you who it was.

Q. When you went to dinner who went with you?

A. We all started out one ahead of the other—there is a little trail and we go along it.

Q. Do you know if this man who loaded this hole and bore the hole went to dinner with you?

A. I don't know.

Q. Do you remember whether Schmitt went with you?

A. He quit the same time I quit, but I don't know—he might have got ahead of me because he walked faster than I did, or I might be faster.

Q. Did Green go to dinner when you did?

A. No, he didn't go with me.

Q. You didn't see him? A. No.

Q. Do you know where he was when you went to dinner?

A. No, I don't know where he was. I don't remember exactly—I [68—54] don't know whether he was eating or not; sometimes he ate there with us, and sometimes he go to the blacksmith-shop and eat—I don't remember exactly whether he went there or not.

Q. You don't know where he was when you went to dinner?

A. No, I don't know where he was when I went to dinner.

Q. And you don't know where he ate his dinner?

A. No, I don't remember whether he ate it there

(Testimony of John Pedrin.)

with us or not—I can't tell; I don't remember.

Q. And you don't know where he was during the dinner hour? A. No.

Q. You didn't see him during the dinner hour?

A. No, I don't remember seeing him.

Q. The man who drilled the hole and fired the shot—do you know where he ate his dinner?

A. He ate his dinner in the house where we all ate.

Q. Did you see him eat his dinner?

A. I see him eating there; yes.

Q. Did you go to dinner before he did or after he did?

A. I can't tell you whether he went ahead of me or I went ahead.

Q. Then, you don't know if he remained there after he fired the shot or not, remained at the pit, stayed at the pit a while?

A. He couldn't very well stay there—if he is going to fire the shot, he has to go out of there.

Q. I mean after he fired the shot—you don't know where he went to dinner?

A. He went to dinner all right—I don't know whether he went ahead of me or I ahead of him. We all started to eat; we don't take notice who is behind the other—I never take attention to things like that.
[69—55]

Q. You don't know whether he went to dinner before or after you? A. No, I don't.

Q. Now, then, after you had your dinner you came back and proceeded immediately to go to work—is that correct? A. Yes, sir, that is correct.

(Testimony of John Pedrin.)

Q. Did you make any examination of the place before you started to work, when you returned from dinner?

A. No, sir, I did not, because unless I go to work—he told me right away to do that work and get the powder and I went.

Q. And you didn't make any examination of it?

A. I came back and my partner was with me—he will tell you about it.

Q. Did you make any examination of it?

A. No, sir, I did not.

Mr. BORYER.—That will be all.

(By Mr. RITCHIE.)

Q. You said a while ago that this time when you were working the fifteen hour shift that you got straight time—when you were on the Sampson?

A. Yes.

Q. That is, you mean by that that you were paid for the time the boat was traveling? A. Yes, sir.

Q. So you were not working fifteen hours straight?

A. No, he pay me for the time the boat was traveling—I was getting pay—

Q. Just the same as when you were working?

A. Yes, excepting he didn't pay my eating hour, but he paid me when the boat was traveling. [70—56]

Q. In the work you have been doing since you came out of the hospital you have been able to use your left arm a little? A. Yes, I can.

Q. And the arm has been getting a little better, has it or not?

(Testimony of John Pedrin.)

A. Yes, it has been getting better, only this muscle is the only thing that bothers me—that is getting worse.

Q. Is the arm as strong as it was before you were hurt? A. No, it can't be.

Q. Can you lift half as much as you could before you were hurt?

A. I don't know. I never try to lift because I am afraid of it.

Q. Does it cause you any pain when you exert it?

A. Yes, sir.

By Mr. BORYER.—How long has this arm been bothering you?

A. It has been bothering me since I got it broke up there.

Q. Did you ever go to consult with the doctor about it, while you were there, after you left the hospital?

A. I told him about this muscle, and he told me it would come back in time, but I don't know what time it will be back.

Q. During the month of June you didn't go to see the doctor at all, did you?

A. No, because I thought it was no use to see him.

Q. During the month of May you didn't go to see the doctor, did you?

A. Maybe I see him for some cough medicine or some cold or something like that.

Q. Or stomach trouble?

A. Yes, maybe I did; I don't remember.

Q. Now, then, you came here—did you ever consult any physician here? [71—57]

(Testimony of John Pedrin.)

A. Yes, I was with a doctor here.

Q. What doctor? A. Dr. Boyle.

Q. Who sent you there?

A. I went myself to see him.

Q. When did you go to see him?

A. I saw him some time last month.

Q. Just last month?

A. Last month and this month—I have been *been* twice.

Q. You have been to see him twice? A. Yes.

Q. Your first time was last month?

A. I don't know exactly what time it was—I went one day, but I don't know whether it was last month or the month before—yes, the last month.

Q. You have been to see him twice? A. Yes.

Q. Why did you go to see him?

A. I went to see him because this muscle bothered me—and I went to find out if it was possible to be cured.

Q. You went to see him after you had started this lawsuit, did you not? A. Well, yes, I see him.

Q. You hadn't been to see him before, had you?

A. Yes, when I came from Latouche.

Q. That was in August?

A. Well, I came in, when I came from Latouche, but I had been here working for a while—I don't remember exactly. I can't tell you what day it was.

Q. (By Mr. RITCHIE.) As a matter of fact, I told you to go and see [72—58] Dr. Boyle, didn't I—isn't that correct? A. Yes, you told me.

By Juror FISH.—When you left Latouche, did

(Testimony of John Pedrin.)

you get fired, or did go of your own accord?

A. I left of my own accord.

By JUROR.—Don't you draw your wakes while you are in the hospital? A. No.

Q. Had you any other light except this lantern?

A. None except that lantern—that is all.

Q. That is all you had? A. Yes, sir.

(By Mr. BORYER.)

Q. You were not charged board during the time you were in the hospital?

A. No, sir, they didn't charge me board.

Q. And you were not charged for your physician?

A. No; we all pay that when we are working—every day we are working. They charge us so much a month for the hospital.

By JUROR.—Does the company there *had* an electric light plant?

A. Yes, they have a little electric light plant there.

JUROR.—There was none in the glory hole?

A. No, only to the main tunnel that runs from the level where the ore is—they got an electric light there quite a ways in the tunnel.

(By Mr. BORYER.)

Q. You had been working with this same light that you were using this night right along there, had you not, in that pit? [73—59]

A. We had that light there.

Q. And that was the only light you had?

A. When we started we had two lanterns—it was a soft night and one of the lanterns, the globes, went out and we only had one lantern afterwards.

(Testimony of John Pedrin.)

Q. The two lanterns gave you sufficient light to do your work by?

A. Sometimes it does and sometimes it didn't.

Q. When this lantern broke, what did you do?

A. I put it one side.

Q. You didn't ask for another lantern?

A. They didn't have any more, not around the work, than what they were using—pretty near all the globes broke.

Q. You had been working with that same kind of light ever since you had been working in that pit?

A. Yes, that lantern that was broke was my own because I pay for it.

(By Mr. RITCHIE.)

Q. Why didn't you go to a doctor here before I sent you to Dr. Boyle—was there any reason why you didn't consult a doctor about your arm?

A. What do you mean by that?

Q. I can't give you the answer—I know what you told me. Why didn't you go to a doctor before I got a doctor for you?

A. Well, I told you I was doing a little work and he told me any time—

Q. You don't understand the question. Why didn't you go to a doctor before you came to me, before you knew me?

A. Because I was broke—I had no money. [74—60]

(By Mr. BORYER.)

Q. You were there at Latouche a couple of months

(Testimony of John Pedrin.)

working? A. Yes, sir.

Q. And you were paying the company two dollars a day for a physician? A. Yes, sir.

Q. And you had the opportunity of going to him at that time, had you not, and talking to the doctor in regard to your arm?

A. I told him at that time about this muscle and he said come back again.

Q. I mean while you were at Latouche during July—during June and July you say you didn't go to see the doctor there about your arm but did go, perhaps, to get some cough medicine or something?

A. I might go; I don't remember exactly.

Q. You could have gone to him and consulted with him at any time, could you not?

A. Maybe I could.

Q. And it wouldn't have cost you anything, would it?

A. No, because we all pay for it—it would cost me something because I had to pay two dollars a month.

Q. And you had already paid for that?

A. Yes, sir.

Q. Taken out of your wages? A. Yes, sir.

Q. You left there the first of August and you drew down or you had earned \$105.45 that month, hadn't you? A. Yes.

Q. And you drew your check just before you left, had you not, for your time? [75—61]

A. Yes, sir.

Q. And you had money then?

A. I had a little money—when I was in Latouche

(Testimony of John Pedrin.)

I was broke and I owed Johnny Wild a bill and I owed for rubber boots and a slicker when I started to work.

Q. You came away with a check for \$64?

A. No; I came from there with about thirty or forty dollars when I left. I pay my fare out of that and when I arrive in Valdez I don't know where to go, whether there was any work around here, and I had to keep that money for eating and sleeping.

Q. Did you go to any physician here and tell him you were broke and that you wanted to consult with him in regard to your arm?

A. Well, I never did do that and I don't like to do a thing like that as long as I can go without doing that.

Witness excused. [76—62]

[**Testimony of F. M. Boyle, for Plaintiff.**]

F. M. BOYLE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Frank M. Boyle.

Q. What is your business?

A. I am a practicing physician in Alaska.

Q. Where do you reside? A. Valdez.

Q. How long have you lived in Valdez, and practiced your profession here?

A. I have lived here for a period of twelve years.

Q. Are you acquainted with John Pedrin, the plaintiff in this action?

(Testimony of F. M. Boyle.)

A. I have met the gentleman.

Q. How long have you known him?

A. I have known him probably for a period of thirty or sixty days.

Q. Did you ever make an examination of him to find out about injuries he claims to have received?

A. I have.

Q. How often?

A. I have made two examinations.

Q. When was the first one?

A. I judge about three or four weeks ago the first examination was made.

Q. And when did you look at him again?

A. Yesterday.

Q. Will you have him bare his left arm so you can show to the jury his injury? [77—63]

A. It would be advisable to remove his shirt—take off your shirt.

(Plaintiff does so.)

Q. Now, just describe the various injuries you noticed there to the jury.

A. There is evidence of a fracture here of the left arm, the upper third. This muscle here is the biceps muscle; it has been separated from its attachment up above here.

Q. Go ahead and describe further the injury to the arm and the present condition and the probable permanent results, if there are any permanent injuries.

A. The separation of this biceps muscle here from its attachment has impaired the usefulness of this arm. This is the biceps muscle here. You can see

(Testimony of F. M. Boyle.)

how it is in a normal condition and see how it is here as the result of this separation; there has been an atrophy of the muscle as a result of having been torn from its attachment up above.

Q. Atrophy means a wasting away?

A. A wasting of the muscle. This muscle here normally is attached up above here and as the result of this injury it has been torn from its attachment here and is in its present condition—by a comparison here you can see the normal condition and the abnormal condition.

Q. Just describe any difference in the normal condition of his arm up there where you say the severing of the ligaments took place and the present condition.

A. There is evidence here of a fracture of the humerus which has united and it is in very good position, as far as the break is concerned, but it is torn away and separated from its attachment up here.

Q. Does that make any difference in the quantity of muscle and flesh there? [78—64]

A. Yes, by comparing the two arms here you can see the difference—this is the normal biceps muscle and this is the abnormal condition.

Q. What effect would that apparently have on his muscular strength and capacity for exertion?

A. As far as the left arm is concerned, it will materially lessen its usefulness.

Q. Do you consider that impairment of strength permanent or otherwise?

A. I am inclined to believe it is permanent.

(Testimony of F. M. Boyle.)

Q. Now, what other injuries did you discover evidence of?

A. Well, there is a punctured wound here on the left side—there is no bad effects noticeable from that; he spoke about a numbness around here. That is probably the result of some of the sensory nerves having been injured, but it is in no way permanent and nothing that will be of any serious nature. There was evidence here of the ribs having separated from the sternum or chest bone here, but they have united now and there is nothing there that is in any wise abnormal. This wound here on the face as you see has healed.

Q. The only permanent injury that you noticed is his left arm?

A. That is the only permanent injury, yes, sir.

Q. Do you consider the impairment of his strength extensive and serious as well as permanent, or not?

A. Well, it will impair the usefulness of his left arm as the result of this injury.

Q. In making your examination of that arm did it apparently cause him any pain?

Mr. BORYER.—I object to that. [79—65]

Objection overruled. Defendant allowed an exception.

A. In making the examination of the arm?

Q. Yes.

A. Well, there is no pain manifest upon an examination of the arm.

Mr. RITCHIE.—That's all.

(Testimony of F. M. Boyle.)

Cross-examination.

(By Mr. BORYER.)

Q. You say you examined him about three weeks ago the first time?

A. I wouldn't say exactly. I judge it was three or four weeks ago.

Q. What kind of an examination did you make at that time?

A. I had him strip. I went into the history of the case. I compared the injured arm with the opposite one and of course it was self-evident that there was a separation there of the biceps muscles.

Q. Did you base your opinion partly on the fact of your comparison of that arm to his right arm?

A. Yes, sir.

Q. Do you consider that his right arm is a normal arm?

A. The right arm, so far as the biceps muscle is concerned, it is.

Q. Did you examine the muscle of the right arm?

A. Yes, sir.

Q. What kind of an examination did you make of the muscle?

A. I tested it as to the development of the muscles and a comparison with the opposite muscles.

Q. What manner of test did you make?

A. Well, I endeavored to get the grip of the arm, his hand, [80—66] and was comparing it on the two sides and there was a marked impairment on the left side as compared with the right side; went into a history of the case and based my conclusions

(Testimony of F. M. Boyle.)

on what he stated.

Q. Based your conclusions, then, on what he told you?

A. I based my conclusions on my observations and upon what he told me.

Q. Then, as a matter of fact, you don't know whether he told you or gave you the facts correctly or not, do you?

A. I have every reason to believe that he did.

Q. Why do you believe that?

A. Well, the statements he made accord with the observations I made.

Q. Don't you know as a matter of fact that in taking his grip or having him work any muscle in his right arm, that that muscle is absolutely under his control?

A. I am fully cognizant of that fact and I gave that full consideration in drawing my conclusions.

Q. Then if he put into play certain muscles that you were trying to test him on, your conclusions would be based entirely on that, would it not?

A. My conclusions were based upon my vision to a great extent—it was self-evident that the biceps muscle was torn from its upper attachment and had furthermore undergone atrophic changes—atrophy.

Q. You couldn't see the muscle, could you, and the muscle of the arm is controlled entirely by the will of the man, is it not? In other words, when you want to make an examination of the muscles it is necessary for you to make your patient make certain movements, is it not? [81—67] A. Yes.

(Testimony of F. M. Boyle.)

Q. And then you watch the development of that muscle from those movements, do you not?

A. You partially base your conclusions in that way, yes.

Q. Don't you practically base your entire conclusions in that manner? A. Not entirely.

Q. What other test do you have of the muscles?

A. The other tests are oftentimes made; they consist of endeavoring to secure the grip and going into the history of the case, find out what facts you can.

Q. Now, then, let us go back to his left arm. You say that there is a wasting away of the muscle up at the portion of the arm where it is attached; is that correct? Is that what you mean by your medical term?

A. I mean to convey that there is a wasting of the biceps muscle; it has been torn from its upper attachments, and has, as you had opportunity to see here, undergone wasting changes.

Q. Is it adhered to its proper place now or not?

A. Has it now?

Q. Yes. A. No, it has not.

Q. Could you tell by an external examination?

A. Yes, sir.

Q. How do you reach that conclusion—how do you make that examination?

A. Well, by palpitation, that is, by the sense of touch and by ocular evidences—it is self-evident that there is an abnormal condition there. [82—68]

Q. Is it not a matter of fact that in any broken limb, as well as any other portion of your body, that

(Testimony of F. M. Boyle.)

if those muscles are not used that there is a general waste away and nondevelopment?

A. That applies to any of the extremities that are not in use—they will undergo atrophic changes or wasting changes when they are not in use.

Q. After you have a fractured arm or leg, during the time that the patient is confined to his bed, that limb is not used is it, ordinarily? And there is a general wasting away of muscle, is there not?

A. That doesn't necessarily always apply; when we have on what is known as ambulatory splints, permitting the limb or extremity to have certain movements, permitting the subject to exercise the limb, these wasting changes are not so manifest.

Q. But there are certain muscles that are not used, are there not? A. No.

Q. Those muscles become weak and waste away, do they not? A. Yes, sir.

Q. And it is not until after the patient is restored to such a point that he can use those muscles that they develop again, is it?

A. That is usually the case.

Q. And they do develop normally in course of time, when used? A. Yes.

Q. Now, then, as a matter of fact, the wasting away of that muscle may have been caused because he hasn't used the arm and that is the cause of it?

[83—69]

A. Why, the muscle is torn from its upper attachment here—it is self-evident it is separated.

Q. It has adhered some other place, has it?

(Testimony of F. M. Boyle.)

A. It is torn entirely from up above.

Q. In what condition does that leave the muscle?

A. Well, the muscle has come down in a sort of lump there; it doesn't perform its normal function to the same extent it did before it was separated and as a result it has undergone these wasting changes.

Q. Now, then, you don't know what caused that, do you?

A. No, I don't positively. I can only go from the history of the case.

Q. From such facts as he told you?

A. From such facts as he has given me.

Q. You don't know whether that happened at the time his arm was broken or not, do you?

A. I have only got his statements for that and my own observations.

Q. You don't know whether it happened after that then, do you? A. After when?

Q. After his arm was broken—that he might have torn those muscles after that? Except from what he has told you?

A. I think it is very improbable.

Q. Why?

A. For the reason that to separate those muscles from the bone it was the result of some violent—either a blow or some violent action, and I can't conceive of a man subjecting himself to any violent action of any kind after an injury of that sort.

Q. You don't know, though, do you? [84—70]

A. I don't know, of my own knowledge.

Q. He might have had some blow since then?

(Testimony of F. M. Boyle.)

A. There might have been.

(By Mr. RITCHIE.)

Q. Do I understand that that condition could only result from a violent blow or a tremendous strain?

A. Yes.

Q. Longitudinal strain? A. Yes, sir.

Q. Has the plaintiff here a normal right shoulder?

A. No, he has not.

Q. Do you know the cause of that abnormality?

A. Only from the history of the case.

Q. Is that apparently from some previous injury?

A. It is apparently from an injury, yes, of very long standing.

Q. Does that abnormality have anything to do with his biceps muscles in his right arm? A. No.

Q. His right biceps are absolutely normal?

A. Yes, sir.

Witness excused. [85—71]

[Testimony of John Schmitt, for Plaintiff.]

JOHN SCHMITT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. John Schmitt.

Q. What is your business?

A. Mining and prospecting.

Q. Where are you working now?

A. I work here in the Cliff mine.

Q. You have worked at Ellamar? A. Yes, sir.

Q. How long have you been in this part of Alaska?

(Testimony of John Schmitt.)

A. I come here to Alaska in 1906.

Q. And you have been working as a miner most of the time since?

A. Yes, I work at mining and railroading.

Q. Did you ever work at the Beatson mine on Latouche Island? A. Yes, sir.

Q. When did you work there?

A. I worked there last year.

Q. Were you working there in the latter part of January? A. Yes, sir.

Q. Were you there when John Pedrin was hurt?

A. Yes, sir.

Q. Were you working with John at the time?

A. Yes, sir.

Q. What time did you go to work that day or night?

A. We went to work seven in the evening.

Q. Where were you working?

A. We started on the day shift to work on the bluff, off the pit, what they call a glory hole—threw the waste in a pile [86—72] and the ore we dumped in the chute; we took the car before the foreman come in and started to load the waste in the car and the foreman came in and gave me orders to go to load ore.

Q. Where were you working that night after seven o'clock—what part of the mine?

A. After seven o'clock we went to load ore.

Q. And how long did you work there?

A. I worked until half-past eleven.

Q. Was anybody working with you?

(Testimony of John Schmitt.)

A. John Pedrin.

Q. What were you and John doing?

A. Mucking in the raise.

Q. Was anybody else working there in the glory hole at the time?

A. No, just two men—you can't work any more men than two men to shovel there.

Q. Was there anybody else working close by?

A. No, about 15 or 20 feet, like that—in the pit.

Q. Were there any drillers working around there?

A. Yes, Cooney and what is that other fellow's name came from the Iditarod?

Q. Were they working near the glory hole?

A. They were working at the top, drilling holes right in the top, to shoot.

Q. Did they put in the powder while you were there?

A. We were mucking there, about half-past nine they got filled up, they got ready to shoot—

Q. All I want to know is what you and John were doing and what the drillers were doing before you knocked off at eleven. [87—73]

A. John and I were mucking and the other two men were drilling at the top.

Q. Did they put any powder in the hole before you left to go to dinner?

A. They were ready to, about ten or half-past ten, when he spring this hole and Mr. Cooney run the machine and Green say, "I want to give you orders"—

Q. Just tell what happened.

(Testimony of John Schmitt.)

A. Cooney was the machine-man.

Q. You quit work and went to lunch at half-past eleven? A. Yes, sir.

Q. How long were you gone to lunch?

A. Twelve o'clock; we start to work again after our lunch.

Q. Do you know whether any shots were fired while you were at lunch?

A. Yes, there was buldoze on the big pit.

Q. Where did you go to work again after lunch?

A. We came after lunch at twelve o'clock and we start—I take the pinch bar and I want to pry this alongside of the glory hole where the shot went.

By the COURT.—He asked you where you went to work when you went back from lunch.

A. I came to the same place where I was.

Q. In the glory hole? A. In the glory hole.

Q. Who were you working with?

A. With John and Mr. Green.

Q. Who is Mr. Green?

A. He was the foreman of the night shift.

Q. Who were you taking orders from? [88—74]

A. From the foreman.

Q. From Greene? A. From Greene.

Q. Now, when you went back to the glory hole after 12 o'clock did you get any orders? A. Yes.

Q. From whom? A. From Mr. Green.

Q. What did he tell you to do?

A. He told me, he say, "John, leave alone that; I don't want to bar down; I want to draw from this chute." There was ten or fifteen boulders, big

(Testimony of John Schmitt.)

rocks, on the top of this raise there, raised from below, I guess about 80 or 90 feet. I don't know exactly how far it was from below, from the track, from the chute.

Q. Do I understand that Mr. Green told you, you and John, to go and bulldoze those rocks at the bottom of the glory hole?

A. Yes; he say, "I want to bulldoze those rocks as quick as I can. John, go and get powder and bulldoze that rock," and I said, "No, I don't go after powder; I have no right powder-monkeying—the powder monkey gets his wages; I get mucker wages. I want to bar down before I go bulldozing." He said, "Nothing doing; this ground is solid." I said, "By golly, I don't know; I have to try."

Q. What did you do when you went to work, you and John?

A. He told John and John went after powder and bring the powder and said, "John, don't you want to bulldoze? Green told me to bulldoze there at the top of the raise there, he want to draw for the chute, and I said, "I don't take no [89—75] chances until we bar down."

Q. Did you and John, after you got the powder, go ahead? A. Yes, sir.

Q. What kind of light did you have, if any?

A. A hand light.

Q. One of the jurors wanted to know about these lights—did you have just one lantern?

A. We had two—he had one and I had one.

Q. Where did you get those lights?

A. We get them from the company.

(Testimony of John Schmitt.)

Q. You bought them yourselves?

A. Yes, sir, we bought them ourselves.

Q. You had to furnish your own light?

A. Yes, sir—of course they had lights and lanterns, but they had no globes.

Q. What were you and John doing just before he was hurt? A. Mucking.

Q. What position were each of you in?

A. Mucking—I stay this way and he stay on the other side and mucking on this raise.

Q. What was John doing—what particular thing was John doing?

A. When he was ready to bulldoze—

Q. He was fixing the powder to bulldoze?

A. Yes, there was a raise like this corner exactly; it was raised right in the corner; there was a wall here and a wall here and was open about ten or twelve feet from this corner.

Q. John was at the bottom of the glory hole fixing the powder to break a big rock?

A. Yes, sir, he had first time about fifteen rocks on the top [90—76] chute or raise from below.

Q. Now, while John was fixing the powder on this rock, what were you doing? A. I hold the light.

Q. You held the light for John? A. Yes, sir.

Q. What happened, if anything?

A. What happened was, it was frozen ground and the rock came down and John was fixing the powder like that, and I see it move and I hollered to him to look out, and I started—I hollered, “Look out!” and there dropped a big slab on his back that came down,

(Testimony of John Schmitt.)

and he fell down on a big rock, enough to break his head.

Q. You got out of the way?

A. Yes, I was four or five feet behind.

Q. I understand this rock and frozen ground fell on top of him.

A. Yes, and he fell on his face and I thought he was dead, sure as anything.

Q. What did you do?

A. And then I set down my lantern and grabbed the rocks and rolled from him and grabbed for this slicker and pulled his head, and when I pulled his head I thought he was dead, sure, and he was bleeding all over, and I take his hand and feel his arm and it was just the same as like a piece of wax, and I started to go on the second floor and start hollering.

Q. Did you take any rock off of him before you left?

A. Yes, I rolled all the rock and muck and everything.

Q. Did that come down in a solid piece or did it break?

A. Yes, it was a solid piece and break in two pieces.
[91—77]

Q. You took it off of him and went for help?

A. I rolled it one side and grabbed for the slicker and pulled his head, and then I went on the second floor and started hollering, and three fellows came there and picked him up and carried him down on the second floor.

Mr. RITCHIE.—That's all.

(Testimony of John Schmitt.)

Cross-examination.

(By Mr. BORYER.)

Q. How long had you been working there in this glory hole? A. I guess about a week.

Q. How long had you been working at the mine?

A. I work five months.

Q. You worked there for about five months?

A. Yes.

Q. What portion of the mine were you working in during that time?

A. I don't know; the first time I start I take the muck from the top—there was a kind of tunnel, timbered with open planks, and it was solid muck on top, about 6 or 8 feet; it was red muck on top of solid ground.

Q. How long had you worked in this particular place?

A. This particular place I work about, I guess, a week, on this glory hole.

Q. That is the place where John was hurt?

A. Yes.

Q. And you had been working on the night shift?

A. Yes.

Q. All the time?

A. No, working about fifteen days on the night shift and fifteen days on the day shift. [92—78]

Q. Then you had worked about fifteen days on the night shift at this particular place, had you?

A. No, not in this particular place—they got no muck there before they shoot—they have nothing to do there in the glory hole.

(Testimony of John Schmitt.)

Q. Had you worked on the day shift at that place?

A. Yes, I did.

Q. About how long had you worked on the day shift at that particular place?

A. When they get lots of muck there.

Q. About how long?

Q. When they get lots of muck there we work all the shift and when they don't, we work five hours or three hours.

Q. Did you work there two weeks on the day shift?

A. Sure, when they get the muck.

Q. Had you worked there two weeks on the night shift?

A. Yes, worked three or four weeks on the night shift, sometimes.

Q. You had worked there then as long as two weeks prior to this accident? A. Sure.

Q. At night—on the night shift? A. Yes.

Q. Had John been working there with you during these two weeks on the night shift?

A. Sometimes he work and sometimes not—sometimes put another man there.

Q. Now, you say you went to work at seven o'clock on the 25th or 26th of January, the day John was hurt?

Q. Something like that—I can't tell exactly the date.

Q. And you remained at work until 11:20 or 11:30 that night, in that place? [93—79]

A. We have lunch at half-past seven.

Q. What were you doing? A. Mucking.

(Testimony of John Schmitt.)

Q. What do you mean by mucking?

A. Mucking a hole in the raise.

Q. That is, you were shoveling the ore?

A. Yes, in the raise.

Q. In the raise or shaft? A. Yes, in the hole.

Q. That was ore that had been shot down from the side wall, was it? A. Yes.

Q. Now, how long had these drillers been working in there that night? A. I guess three hours.

Q. Did they start to work when you started to work?

A. Yes, the machine was set when I came to work.

Q. The machine was set when you came to work and they came to work the same time you did?

A. Yes, sir.

Q. And then they started to drilling?

A. Yes, sir.

Q. They were drilling above you, were they?

A. Yes.

Q. About how far above you?

A. About four feet.

Q. About four feet? A. Yes, sir.

Q. How far away from them were you?

A. Four feet from the wall. [94—80]

Q. Four feet from the wall?

A. There is a wall—four feet from this side, from the wall and there was a hole right there in the corner.

Q. About how many feet away?

A. Well, I guess maybe 8 feet.

Q. What kind of a drill were they using, do you know? A. Steel, a 250-pound machine.

(Testimony of John Schmitt.)

Q. How was that machine fastened?

A. On three legs.

Q. It stood up on three legs?

A. Yes, it stood up on three legs.

Q. How many men were working in that?

A. Two men—the machine-man and the chock-tender.

Q. Do you know their names?

A. Cooney was the machine-man and I can't tell you this man that was chock-tender.

Q. You saw them working there?

A. Yes, I saw them working there.

Q. Did you see them drilling? A. Yes, sir.

Q. And you are certain they were working there about three hours? A. Yes, about three hours.

Q. That would make it about ten o'clock they quit drilling? A. Yes.

Q. What did they do when they finished drilling?

A. They spring their hole.

Q. How do they spring their hole?

A. They put powder in two or three sticks or four sticks and spring it and next about eight sticks, and then they can't [95—81] get powder enough, they have to put maybe fourteen sticks.

Q. How many times did they spring this hole that night? A. Two times.

Q. They sprung it twice while you were there working? A. Yes, sir.

Q. What did you do when they were springing those holes?

A. When they were springing the hole they tell me

(Testimony of John Schmitt.)

to get out—to get out from the smoke.

Q. And you and John went out, did you?

A. Yes, sir.

Q. And then you came back and started to work again? A. Yes, sir.

Q. You went out two or three times?

A. Two times.

Q. Twice only? A. Yes, sir.

Q. After they sprung the hole what did these men do? A. Cooney asked Green, he say—

Q. Answer my question—after they had sprung this hole what did they do?

A. Green came out—

Q. What did these drillers do?

A. Cooney wanted to get powder—he says “I want to spring a third time.”

Q. Did he spring a third time? A. No.

Q. What did he do then?

A. Green don't allow it.

Q. What did the drillers do then?

A. What the drillers done they done by Mr. Green's orders.

By the COURT.— [96—82] You can be asked later to explain by Mr. Ritchie, but answer these questions—tell what the drillers did, whether they put in another spring, put in the main blast or what.

Q. What did the drillers do then?

A. The drillers did it by Mr. Green's orders.

Q. Did they do any work?

A. No, they had orders.

Q. I ask you what they did.

(Testimony of John Schmitt.)

A. Mr. Green told them, "Load this hole and blast."

Q. Did they load the hole then? A. Yes, sir.

Q. How many sticks did they put in it, do you know?

A. I don't know; I never count it.

Q. Did you see them loading the hole?

A. No—I see them loading the hole.

Q. Did you or did you not see them loading the hole? You said yes and no.

A. Yes, I see them loading the hole.

Q. They had worked now up to ten o'clock springing the hole and then they loaded the hole—about what time was it then?

A. It was ten o'clock when they made the second spring and Mr. Green came over and he see Cooney. He say, "I want to make one more spring," and he said, "Never mind one more spring; load this hole and blast."

Q. Now, what time was it when they had finished loading the hole? A. It was about half-past ten.

Q. Did they fire the shots then?

A. They fired the shot lunch-time.

Q. After they had loaded this hole at half-past ten you didn't go to dinner until about 11:20, did you? [97—83] A. Yes, sir, 11:25.

Q. Was this shot fired between—after it was loaded and the time you went to dinner?

A. It was after we went to lunch.

Q. Did you see it shot? Were you there when they shot it off?

(Testimony of John Schmitt.)

A. Yes, I saw it when we came back after lunch.

Q. Were you there when the shot was fired?

A. No, I never was there when the shot was fired.

Q. Did you hear the shot fired?

A. I heard several shots fired.

Q. Did you hear these particular shots fired?

A. Yes, sir.

Q. Where were you then?

A. I was close to the house where we had lunch.

Q. How do you know it was these shots?

A. Because the different signals, the different sound from the bulldoze and the big shot.

Q. You could hear it distinctly, could you?

A. Yes, sir.

Q. And who was with you when you heard it?

A. All was pretty near there.

Q. Was John there?

A. All was there pretty near.

Q. Was John there?

A. I don't know,—I can't tell exactly whether he was there or not.

Q. You say there was some bulldozing being done while you were down there working that night?

A. Yes, sir.

Q. Before you went to dinner? [98—84]

A. When I got to bulldoze I have to report for the big shot and I got report for the big shot—

Q. Repeat that.

A. When I got report for a big shot and have got big boulders there, five or six boulders, and we

(Testimony of John Schmitt.)

have to wait for report, before he give me report and let me bulldoze.

Q. You were helping to do some bulldozing down in there that night? A. Yes, sir.

Q. Before you went to dinner? A. Yes.

Q. John was helping you? A. Before dinner?

Q. Yes.

A. Yes, we had a couple of bulldozers there in the pit.

Q. About how many shots do you fire in the bottom? A. About four or five.

Q. You fired about four or five that night before you went to dinner? A. Yes, sir.

Q. How heavy were the charges?

A. Two sticks.

Q. What number? A. Forty per cent.

Q. Do you know where Mr. Green ate his dinner that night?

A. I don't know. I never see him eating his dinner.

Q. After this shot was fired, do you know where Mr. Green was?

A. No, I don't know where he was.

Q. You don't know where he ate his dinner?

A. No. [99—85]

Q. You didn't see him from that time until you returned to the pit?

A. To the pit—no, sir.

Q. Then you saw Green there, did you?

A. Yes, sir.

Q. These drillers fired this shot, did they?

(Testimony of John Schmitt.)

A. Yes, sir.

Q. Did you see the drillers when they were at dinner or not, do you remember?

A. I saw him in the shed there.

Q. What do you mean by the shed?

A. They had a shed there—they had lunch in the shed; I saw him there.

Q. Did you have lunch there in the same place?

A. Yes, we all had lunch the same place.

Q. Now, then, did you see these drillers after they had fired this shot—between the time that they fired the shot and the time that they came to dinner?

A. No.

Q. You didn't see them? A. No.

Q. You don't know where they were? A. No.

Q. You don't know what they were doing?

A. No.

Q. When you went back, did you see the drillers then? A. Yes, Cooney was there.

Q. What was he doing?

A. He don't do nothing; he was just standing and looking.

Q. Was he one of the drillers? [100—86]

A. Yes, he was the machine-man.

Q. Where was the other driller?

A. The chock-tender? I don't know; I never saw him.

Q. You say you took a bar and tried to do something—what was that?

A. Yes, I took a bar and tried to get loose the rock and bar down.

(Testimony of John Schmitt.)

Q. Bar what down? A. After the shot.

Q. Why did you take a bar to bar it down?

A. Because I know the rule for firing—they have to look at this ground, if it is loose or not.

Q. What do you mean by rule?

A. A rule, when they are going to shoot any place, when they blast on a railroad or mine, they have to examine the place before they go to work.

Q. They have a rule there that you have to examine your place? A. Yes.

Q. Is that known to everybody there?

A. Yes, sir.

Q. And if you think there is any loose earth there or rock, it is your duty to bar it down, is it?

A. I never saw it.

Q. If there is any loose earth or rock there, after you make your examination, then you take your bar and bar it down?

A. I have to make the examination and take the bar and find out whether it is loose or not.

Q. And if it is loose, you bar it down?

A. Yes, sir.

Q. And what kind of a bar do you use for that?

[101—87]

A. A pinch-bar.

Q. They furnish the bar? A. A company bar.

Q. They require you to do that?

A. I don't know whether they require it or not but I like to save my life before I go down.

Q. And did you try to bar that down?

A. No, he don't allow me to try—Mr. Green stopped me.

(Testimony of John Schmitt.)

Q. You took the bar and what did you start to do?

A. I took the bar and walked from this end all around to the pit, to the glory hole on the other side, and Green came over and say, "John," he say, "I want you to bulldoze here on this raise. I want ore for this chute." "Well," I say, "I don't know. I want to bar down before I go down." He said, "Never mind; it is solid."

Q. He told you it was solid?

A. Yes, he told me it was solid; he never was there—I don't know, but I never was there; he told me it was solid.

Q. You don't know whether he was there or not?

A. I drop my bar then and he told me to go and get powder to bulldoze. I said, "No, I don't get powder." I said, "I get no wages for powder monkey. I get wages for mucker," and I stand there, and he went into the pit and called John Pedrin, and he went after powder and brought powder and to John I say, "I don't take no chances going down there."

Q. You said that to John?

A. I said that to John. Green was there and Green he say, "Never mind, John, it is all solid"—it was sloppy and rain and snow—and I say, "I don't want to bulldoze." "Well," he say, "Go and help John; hold the light," and I say, "All right, I will go [102—88] and hold the light," and it was exactly like this corner, and it was raised there and it was a wall here and a wall here and an open hole here, about 20 feet—it was the first floor, open pit, and we finish this end and start to sink a hole 20

(Testimony of John Schmitt.)

feet and muck this hole and the raise and from below, the first floor, run a car right across the shoot and draw from this raise, right to the car and dump it into the ore chute.

Q. What did John say to you when you told him you took no chance going down there?

A. He didn't say nothing.

Q. He didn't say anything? A. No.

Q. Did you tell him that it was dangerous?

A. No, I didn't tell him—I told to Mr. Green and Green sends—

Q. He told you he thought it was all right?

A. Yes, Green tells it was all right.

Q. You didn't examine the place where they had made the shot, did you?

A. He don't allow me to examine.

Q. You didn't examine it?

A. He don't allow me to examine.

Q. Answer the question: Did you examine the place?

A. He don't allow me to examine it. I want to examine it,—I took a bar but he stopped me.

Q. Did you examine the place?

By the COURT.—Say yes or no, whether you examined it or not. A. No.

Q. Do you know if John examined the place?

A. No.

Q. You don't know. [103—89]

A. I don't know.

Q. Then you didn't see the condition of the wall after the shot had been fired, did you?

A. No, it was all broke up there on the wall.

(Testimony of John Schmitt.)

Q. Could you see that? A. Sure, I can see that.

Q. From where you were working?

A. You take a light you can see where it is all broke up, the wall cracked.

Q. Did you see that from where you were working?

A. No, you couldn't see from where I was working—when I go on top.

Q. Was it a perpendicular, a straight up and down wall? A. Yes, straight up.

Q. And then you have to go on top and look over it? A. Yes, sir—we had a step-ladder.

Q. Did you go up on a step-ladder?

A. Why, sure, when you come out from below, you have to come out with a step-ladder.

Q. You were working about four feet from where the shot was put in, were you?

A. Yes, sir—about 8 feet.

Q. About four feet above your head?

A. Four feet from the wall, about 20 feet above the head.

Q. I mean from the place where the hole was drilled in, where the shot was made—how far was that above your head? A. About 20 feet.

Q. I understood you to say the pit was about 20 feet deep?

A. The glory hole was about 20 feet, yes.

Q. That is the hole you were in? [104—90]

A. Yes, the bottom.

Q. Then was the shot clear outside of the glory hole?

(Testimony of John Schmitt.)

A. It was a straight wall; this is the wall; this is the first floor here and about twenty feet from this floor to the second floor.

Q. But where was it they put the drill in?

A. Four feet from the wall, back.

Q. Was the wall cracked along clear down to the bottom, after the shot?

A. You can see cracks, not from the bottom but from the top.

Q. You could see the cracks there?

A. The wall never break—they didn't have powder enough to break this ground.

Q. Now, you are a miner of some experience?

A. Yes, sir.

Q. How do you do this barring down?

A. Barring down when the shot is out?

Q. Yes.

A. You have to examine this place when the shot is out, whether a man can go down or not; if he can't go down, we have to bar down the rock, take a bar and hammer and work it; you have to look at your roof to see whether it is safe or not—when you work in the pit, you have to look at your walls.

Q. Who has to look?

A. That man that is working in there.

Q. All the men that are working there?

A. Yes, sir.

Q. And you say the rule of the company requires you to look and examine the ground and bar it down before you start to work? [105—91]

A. The company has got foremen there that don't

(Testimony of John Schmitt.)

allow them to do that.

Q. The rules, though, require you to examine it and bar it down? A. Yes, sir.

Q. That is a rule of the company?

A. I don't know whether the company or not but the rules all in the United States, all over.

Q. That is the rule there, is it? A. Yes, sir.

Q. Who is superintendent of that mine, do you know? A. Mr. Van Campen.

Q. And general manager of it? A. Yes, sir.

Q. What was the name of this foreman you were talking about? A. Green.

Q. He was shift boss there, was he?

A. Yes, he was the shift boss.

Q. Now, then, Mr. Ritchie asked you something about lights there—this glory hole was constantly changing, was it not, by reason of breaking down of the walls from the shooting and blasting?

A. Yes, sir.

Q. And the hole was gradually getting larger?

A. Yes.

Q. And it was necessary to do shooting all around there in order to get the ore out, was it not?

A. No, they have to shoot from the top.

Q. What I mean by that is, around through that and the other [106—92] places around this hole:

A. You can't shoot any other way—you have got to shoot down from the top.

Q. They do blasting there then, do they not—break the ore down by that means? A. Yes.

Q. It wouldn't be feasible to have electric lights

(Testimony of John Schmitt.)

there, would it, if you had to do blasting around there?

A. Oh, yes, you can have electric light if you want to.

Q. How could they put an electric light in that hole if you are breaking down on the side?

A. You don't have to put it in the hole—you can put it on the hill.

Q. How far away would you have to put it?

A. Not very far away, 20 or 25 feet.

Q. That is on the outside of the hole?

A. There is red muck right to the glory hole, 8 or 10 or 12 feet. There is a mountain of red muck.

Q. Weren't they blasting all around through the large pit there that surrounded the glory hole?

A. They can put an electric light down.

Q. Were they blasting all around this place?

A. At different times around there—that pit was about 50 feet wide, I guess.

Q. And they were blasting around in that pit right along? A. Sure, they have to blast it.

Q. And then you would have to be moving your electric lights around from place to place?

A. Just take the wire down, that is all.

Q. Just take the wire down every time you wanted to blast? [107—93]

A. Well, that is all that is necessary.

Q. You had been working there for about two weeks, using the same kind of light that you were using that night, had you not?

A. Oh, yes—no, I work about five months with that same light.

(Testimony of John Schmitt.)

Q. And you had worked about two weeks in this pit with that same light, had you?

A. Yes, we had no other light.

Q. And John had worked with you?

A. Yes, sir.

Q. And you did your work in that pit by these lights,—what work you did there you did by means of those lights? A. The mucking.

Q. That is the only light you had?

A. Yes—sometimes we break a globe and we have no globe and we have to work with one light, two men.

Q. The globes were down in the store?

A. They have to buy them—you can't get them from the company for nothing.

Q. You furnished your own lights, then, did you?

A. Yes, sir.

Q. As a matter of fact, you can get lights from the company, can you not?

A. I never had no lights.

Q. Never had any lanterns there?

A. They had lanterns but no globes; they have a store there, about three-quarters of a mile from the mine.

Q. It was necessary, it was required of you then, to furnish your own lights?

A. Sure, not all men but pretty near all; before I start they [108—94] had company lights but when they had these globes, they had lots of lanterns and no globes—you have to buy your own lantern when you want it.

(Testimony of John Schmitt.)

Q. You were required to furnish your own light in order to do your own work with?

A. Yes, sir—it was the company's work.

Q. To do the work you were doing?

A. Yes, sir.

Q. That was part of your employment and part of the things you had to furnish was your own light?

A. Sure, if the company had none you have to buy your own light.

Q. You had to furnish your own light then?

A. Yes, sir.

Q. And that was part of your employment and part of the things you had to furnish?

A. You can't work in the dark.

Q. Now, then, the light you had this night was sufficient, I believe you stated here that you saw it when it started moving—the light you had that night was sufficient for you to see this earth and rock that came down and struck John—to see it when it started moving? A. Sure.

Q. You could see that?

A. His light is gone out and I held my light that way (indicating), and I never look for his work. I look for the wall and when it start moving, I start hollering, and he had no chance to get out and it hit him right on the back.

Q. You told Mr. Ritchie that you saw it when it began to move? A. No.

Q. What did you say? [109—95]

A. I saw where he put the powder—it was between two bulldozes; he had one bulldoze here and

(Testimony of John Schmitt.)

along here and one in the front and then I start hol-
lering and it dropped rocks and muck on his back
and he fell down and I thought he was dead.

Q. Am I mistaken or not in that you said on your
direct examination that you saw this earth and rock
moving?

A. Yes, I saw it when it start moving, sure.

Q. Where did it come from?

A. Right from the top.

Q. Then you could see to the top, could you?

A. You can see certainly—you can see—if you get
exactly the light, you can see.

Q. And your light was such so you could see?

A. I had a light, a hand light.

Q. Then, if you could see it at that time, when you
started to work there, you could see it by the same
light, could you not?

A. Sure, I can see it by the same light.

Q. Did you look up to see the condition of it when
you started to work there?

A. They don't allow us to see.

Q. Nobody can stop you from looking?

A. Green said it—he is the foreman there—Green
stopped it.

Q. He stopped you from looking up there?

A. Sure; he is the boss here or manager—I take
the order you say and have to do by your order.

Q. Do you mean to tell the jury that Green told
you not to look up there?

A. He say, "Never mind; go and bulldoze that—
I want to draw for this chute right away." [110—

(Testimony of John Schmitt.)

Q. Did you look up?

A. No, I had no chance to look up; they stopped me. I had a bar in my hand.

Q. I understood that was when you were on top?

A. Yes, I was on the top.

Q. When you went down in the pit, did you look up to see the condition of it, down in the glory hole?

A. No, I never went right to the glory hole,—I started down to the muck.

Q. You went down to the point where you were going to do this mucking or bulldozing?

A. No, I never went there—I stayed over about 12 feet from this corner, like this, and looked.

Q. When John came back with the powder, you went down into this pit with John, did you not?

A. Yes, sir.

Q. And started to bulldoze it? A. Yes, sir.

Q. When you went down in this pit, did you look up to see the condition of the wall?

A. No, we had no chance to look up; they didn't give us a chance to look up.

Q. Where did Mr. Green go?

A. He went to the pit,—he went maybe to sleep in the powder-house, I don't know. He is not foreman any more there,—he don't know more than a Siwash woman.

Q. He was just pit boss, was he?

A. I don't call him boss and nobody call him boss that is working there.

Q. He was an ordinary laborer? [111—97]

A. Certainly, worse than laborer—a laborer under-

(Testimony of John Schmitt.)

stand more of the work than this foreman that was there.

Q. Now, where did he go?

A. I don't know; I never watch for him.

Q. Did he go down in the pit?

A. I don't know where he went.

Q. You don't know whether he was down in the pit or not when you and John went down?

A. I don't know. I guess he was in the powder-house when they took that fellow to the hospital.

Mr. BORYER.—That's all.

(By Mr. RITCHIE.)

Q. Mr. Green held the position as shift boss, did he not?

(Objected to as leading. Question withdrawn.)

Q. What position did Mr. Green hold?

A. Foreman, shift boss.

Q. How old a man was Green?

A. I don't know how old he is. 22, I guess—24.

Q. You said a while ago it is a rule all over the United States to bar down the walls after a shot?

A. Yes—when a man wants to be safe.

Q. You mean that is a rule of good mining or a statute law? A. Yes, that is a law of mining.

Q. That is a rule of good mining? A. Yes.

Q. Did this company have any such rules?

A. I don't know,—I don't think so.

Q. Did they have any such rules typewritten—written and posted? [112—98]

A. I don't think so.

Q. Did the foreman ever tell you of any such rule,

(Testimony of John Schmitt.)

or the superintendent?

A. The superintendent don't tell me.

Q. It is simply a rule of good mining?

A. Yes, sir.

(By Mr. BORYER.)

Q. You don't know of your own knowledge what this man Green's position was with the company?

A. He was foreman.

Q. Do you know of your own knowledge?

A. No, I don't know.

Q. You don't know what authority he had?

A. No, I don't know.

(By Mr. RITCHIE.)

Q. What is a powder monkey?

A. A powder monkey is supposed to get primers and powder.

Q. He has charge of the powder-house?

A. He has charge of the powder-house.

Q. You said a while ago that you refused to act as a powder monkey? A. Yes, I refused.

Q. You meant by that that you refused to go to the powder-house? A. Yes, sir.

Witness excused. [113—99]

[Testimony of William Gleason, for Plaintiff.]

WILLIAM GLEASON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. William Gleason.

Q. Where do you reside? A. Lakeside.

(Testimony of William Gleason.)

Q. How long have you lived in Alaska?

A. About two years.

Q. What is your business? A. Mining.

Q. How long have you been a miner?

A. Twenty-five years, I guess.

Q. Where did you first work as a miner?

A. In New Mexico.

Q. Where else have you worked in the States and territories?

A. I worked in Lake Superior, British Columbia, Alaska and Arizona.

Q. You were working constantly or nearly so as a miner from the time you started at it until you came to Alaska? A. Pretty much; yes.

Q. And have worked a good deal in Alaska as a miner? A. Yes, sir.

Q. Have you worked in large mines and particularly copper mines? A. Yes.

Q. Are you an expert miner or a pretty good miner? A. I don't know.

Q. Have you done all kinds of work as a miner?

A. Yes, pretty much. [114—100]

Q. Have you drilled much? A. Yes, sir.

Q. Can you run a machine drill? A. Yes, sir.

Q. You have worked at all kinds of mining?

A. Yes.

Q. Now, where a shot is fired in the walls of a mine, particularly an open mine or a glory hole, is there any rule about making an inspection of the surrounding walls immediately afterwards?

Mr. BORYER.—I object to the question for the

(Testimony of William Gleason.)

reason that it is incompetent and immaterial and for the further reason that there is no such question raised in the pleadings, and for the further reason that there is nothing in the case that would warrant the asking of such a question and that the defendant would not be bound by any answer made in response to this question.

By the COURT.—I understand there is an allegation in the complaint to the direct effect that the rule of good mining required that such be done, but the question I am not so clear upon is, whose duty it is to do it, whether it is the man who is in danger himself or whether it is the duty of some one else—that is the important question.

After argument the objection was by the Court overruled. To which ruling of the Court counsel for defendant is allowed an exception.

A. Ordinarily.

Q. What is that—what is the usual course of procedure?

Mr. BORYER.—In order to avoid encumbering the record I want the same objection to go to all similar questions.

(It is so understood and exception allowed.) [115—101]

A. The rule is that a man has got to bar down his ground to make it safe, not to have loose ground in the walls after a blast—that is, if a man is going to work under it.

Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

(Testimony of William Gleason.)

Mr. BORYER.—We object to the question, for the reason that it is immaterial and incompetent, and for the further reason that it has not been shown that this work was under the direction of a shift boss or foreman.

Objection overruled. Defendant allowed an exception.

A. Why, the foreman or shift boss who is in charge.

(By Mr. BORYER.)

Q. Who does the work?

A. The miner, I suppose.

Q. The men working in there you mean?

A. Yes, sir.

Witness excused.

Plaintiff rests.

Mr. BORYER.—I have a motion to present—

The jury having been excused—

By Mr. BORYER.—Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court for a nonsuit in this action for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for [116—102] several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about

(Testimony of William Gleason.)

two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift-boss bore to the defendant and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

After argument the Court took the matter under advisement [117—103] and further hearing of the case was adjourned until to-morrow morning at 10 o'clock.

Tuesday, November 11, 1913.

MORNING SESSION.

By the COURT.—In this case on the motion presented last night I may say that I am not free from doubt in the matter, but following the well recognized and established rule I believe the doubt should be resolved in favor of submitting the case to the jury, and the motion will therefore be denied and defendant allowed an exception.

DEFENSE.

[Testimony of L. V. Smith, for Defendant.]

L. V. SMITH, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. What is your name? A. L. V. Smith.

Q. Where do you reside? A. Latouche.

Q. What is your profession? A. Physician.

Q. How long have you been practicing as a physician?

A. Seven years—a little over seven years.

Q. Are you a graduate of any school?

A. Yes, sir.

Q. What school?

A. Willamette University, Medical Department.

Q. Where did you begin your practice?

A. In Oregon.

(Testimony of L. V. Smith.)

Q. How long did you practice there?

A. Two years—a little over.

Q. Where did you next practice? [118—104]

A. Nevada.

Q. How long were you practicing there?

A. A little over two years.

Q. Where next? A. Latouche.

Q. How long have you been in Latouche?

A. Three years, a little over.

Q. Are you the physician for the company there?

A. The Beatson Copper Company, yes.

Q. Who is superintendent and manager there?

A. Mr. Van Campen.

Q. Were you employed there at the time John Pedrin was injured?

A. Yes, I was physician of the company.

Q. Did you attend him as a physician?

A. I did.

Q. Do you recall what time he was received in the hospital?

A. In the latter part of January, the 25th or 26th,—I don't remember the exact date.

Q. Do you recall when he left the hospital—was discharged from the hospital?

A. I don't remember the exact date.

Mr. RITCHIE.—I would suggest if you have any record of that it would be the best evidence.

Mr. BORYER.—It was on or about the 25th of March, was it not? I think it has been admitted here he went to work on the 25th of March.

(Testimony of L. V. Smith.)

Mr. RITCHIE.—It was about the 25th of March, was it, Doctor?

A. I don't really remember the exact date—the pay-roll would show.

Q. Now, Doctor, you saw Pedrin around there from time to time until he left there, did you not?
[119—105]

A. Yes, sir.

Q. Did you notice what he was doing?

A. He was working around the camp there.

Q. Did you see him shoveling coal, handling coal, etc., there? A. I did.

Q. Do you recall when you made your last examination of the arm?

A. It was the latter part of May.

Q. What was the condition of the arm at that time?

A. Well, the arm was in perfect condition as far as results go, the break; there was no deformity, perfect action, no shortening of the limb.

Q. Were the muscles detached from their original place of attachment?

A. Not that I noticed. I massaged the arm, at that particular time; the muscles were flabby, of course, from nonuse.

Q. That is a natural condition?

A. That is a natural condition existing after six weeks of rest.

Q. Did you watch him there in his work to notice the action of this arm? A. I did.

Q. Tell the jury what you noticed in his work.

(Testimony of L. V. Smith.)

A. I noticed he was able to work with the arm as well as could be expected from an injury, that is, so soon after the injury.

Q. Did you notice him working later on, shoveling coal and things of that kind? A. Yes, sir.

Q. Did he use that arm then? [120—106]

A. Yes, sir.

Q. Now, then, you say you made your last examination some time in May? A. Yes, sir.

Q. Did he ever come to you between that time and the first of August to consult you regarding the arm?

A. No, sir.

Q. From your experience as a physician and your examination of the arm, would you say that that arm was in such a condition at that time that he would suffer permanently from it? A. No, sir.

Q. Are you acquainted with Mr. Green who has been spoken of here in this case? A. Yes, sir.

Q. Do you know where he is? A. No, sir.

Q. Is he working for the company?

A. No, sir.

Mr. BORYER.—That's all.

Cross-examination.

(By Mr. RITCHIE.)

Q. How long since Mr. Green has been working for the company?

A. I don't know how long—how long since?

Q. Yes—how long since he left there?

A. I don't remember; a couple of months, I think.

Q. It wasn't your duty to take much notice of the coming and going of employees?

(Testimony of L. V. Smith.)

A. Well, I was acquainted with Green. I remember when he left but I don't remember the date.

Q. Was it last spring? [121—107]

A. No, it was this spring.

Q. What time of the day was it that Pedrin came to the hospital—when they brought him in?

A. It was after midnight.

Q. Where is the hospital at Latouche?

A. Why, it is right in front of the store there.

Q. How large a building is it?

A. I think it is 8 feet wide by twenty-some long. I am not sure.

Q. Has it the general equipment of a hospital, that is, as far as a small hospital could have it?

A. Yes, of that size.

Q. Good beds and cots?

A. Yes, regular hospital beds.

Q. What injuries, if any, were shown on Pedrin's body and limbs when you first saw him?

A. He had a laceration of the face, a laceration of the side, the left side and a broken left arm, the upper third.

Q. The bone of the left arm was broken?

A. Yes, sir.

Q. Where? Just below the shoulder?

A. No, it was the upper third, up in the middle third.

Q. Indicate on your left arm where the fracture was. A. The upper middle third of the arm.

Q. Was there any laceration of the biceps muscles? A. It wasn't in evidence at that time.

(Testimony of L. V. Smith.)

Q. Were the ligaments detached?

A. That is pretty hard to discover at that time.

Q. Could you make the discovery later?

A. I could; yes.

Q. Was there any such detachment of the ligaments? [122—108]

A. No, sir.

Q. None of them were ruptured at all?

A. No; the action of the muscles of the arm showed there was perfect action.

Q. There was nothing wrong with the muscles except the incidental strain that might come upon them by reason of the fracture of the bone; is that correct? A. That is correct.

Q. How often did you see Pedrin in the first few days? A. Every day.

Q. And he was there under your constant care?

A. Yes, sir.

Q. What was the extent of this laceration on his breast, how deep was the cut and how long was it?

A. It was about four inches long, extending near the arm-pit in the pectoral muscle.

Q. Was there more than one injury on his body?

A. There was just the one laceration.

Q. Beginning here, near the left nipple?

A. It was over further.

Q. A little nearer the shoulder?

A. In the muscle, in the pectoral muscle, at the side.

Q. Toward the side? A. Yes, sir.

Q. Was the muscle detached from any of the ribs?

(Testimony of L. V. Smith.)

A. No, sir.

Q. How did you heal that laceration of the body?

A. By suture.

Q. Did you bind it up with bandages or straps around his body? A. Yes, sir. [123—109]

Q. Were you in court yesterday when he stated that he had his body bound up for a long time?

A. Yes, sir.

Q. Was that correct? A. Yes, sir.

Q. How long was he obliged to lie with his body bound up in this way?

A. He was in bed twenty-one days.

Q. The object of that, of course, was to keep the flesh or muscles of the body immovable so they would heal perfectly? A. No, sir.

A. What was the object of it?

A. It was with the object of correcting the fractured rib.

Q. There was one fractured rib? A. Yes, sir.

Q. Where? A. Near the sternum, the third rib.

Q. It wasn't necessary then to keep his body bound in order to enable the muscles or flesh to heal properly? A. No.

Q. Now, you examined this arm from time to time while he was there? A. I examined it twice.

Q. He remained in bed you said twenty-one days?

A. Yes, sir.

Q. You examined it twice after he got out of bed?

A. Yes, twice after.

Q. Once twice? A. Only twice.

Q. How long did he stay in the hospital after he

(Testimony of L. V. Smith.)

got out of bed? [124—110]

A. Well, he was off and on in the hospital about six weeks.

Q. Do you remember of your own knowledge when he first began to do some kind of work around there?

A. I can't remember the date. I see him working around there.

Q. What did you see him do?

A. Well, he was cleaning up around the bunkers, loading the cars.

Q. How would he do that work?

A. Shoveling it.

Q. Did you watch him closely to see how he worked? A. I was interested in the arm, yes.

Q. Is he a right-handed or left-handed man?

A. Right-handed.

Q. And in shoveling it is a fact that the arm which is most used is the one upon which nearly all the strain is put? A. As a rule.

Q. Haven't you in your practice, not only as a physician but in your experience as a man, seen a great many men with crippled arms who could do such work as shoveling or handling pitch-forks? Is it not a fact that about all a right-handed man does in that work with his left hand is to steady the handle? A. He has some pressure on that hand.

Q. Did you ever handle a shovel yourself?

A. Not a great deal; no.

Q. You are not familiar with it from your own experience? A. No, I am not.

Q. Then if you haven't had any experience would

(Testimony of L. V. Smith.)

you be able to say, simply from the standpoint of a physician, that a man with a crippled left arm, a lame left arm, couldn't shovel? [125—111]

A. I was only watching the action of the arm.

Q. Did you see him do any work which necessarily put a heavy strain on the left arm?

A. Well, shoveling is a pretty heavy strain on any arm.

Q. That is your conclusion?

A. That is my opinion.

Q. You couldn't say from actual experience or study of the question whether a man could not shovel with one arm that was—

A. I haven't had any actual experience with heavy shoveling and couldn't say.

Q. Did you ever see a man with half his arm gone, using a hook and doing two-handed work?

A. I can't say I have,—I don't recall any case.

Q. You say you examined this arm twice after Pedrin left the hospital? A. Yes.

Q. When was the first time you made an examination of it?

A. When I removed the splints and put it in a cast.

Q. When was that?

A. That was about, I think, forty days.

Q. After the injury?

A. I left the splints on forty days.

Q. That was about the time he went out of the hospital?

A. Yes—well, he was in the hospital back and

(Testimony of L. V. Smith.)

forth all the time.

Q. When did you take the cast off?

A. In six weeks.

Q. And did he shortly after that begin to work?

A. I don't know how soon afterwards. [126—

112]

Q. What is the ordinary length of time it takes a fractured bone to heal in a man of his age?

A. It all depends on the bone and the physical condition of the man and the nature of the fracture.

Q. Was this a splintered fracture?

A. It was a direct break.

Q. And was he a healthy man in good physical condition at that time? A. He was.

Q. And in a man in that condition a break heals quite readily? A. It does.

Q. If there is no accident afterwards?

A. Yes, sir.

Q. And the ordinary time would be six weeks or so? A. Yes, five or six weeks.

Q. Is the bone at that time fully healed or is it liable for quite a long time afterwards to fracture?

A. No, if the position—if the bone is in that position, it is supposed to be perfect.

Q. It should be fully as strong? A. Yes.

Q. When did you next examine his arm after he had gone to work?

A. I examined it when I put on the plaster cast and when I removed the plaster cast I examined it again.

Q. I mean after that?

(Testimony of L. V. Smith.)

A. The latter part of May.

Q. Just once? A. Just once afterwards.

Q. What was its apparent condition then?

A. Well, he had perfect action—no deformity that I could see. [127—113] I massaged all the muscles—of course the muscles were flabby.

Q. Did you see his arm yesterday when it was bared in the courtroom?

A. Only at a distance.

Q. Did you notice the condition Doctor Boyle described and which he indicated to the jury, of a hard, heavy lump being here, just a little ways above the elbow and the arm seemed attenuated up here at the biceps muscle, so there was very little flesh between the skin and the bone?

A. I couldn't see at that distance and couldn't form any opinion from that distance.

Q. If that condition existed would it be abnormal or perfectly natural?

A. I couldn't form an opinion without an examination.

Q. Is that a normal condition of an arm, to have a hard lump just a little below the biceps muscle, above the elbow, at the point where the biceps doubles up to be thinner, smaller, with a lump further down?

Mr. BORYER.—We object to that; no such condition has been shown.

Objection overruled. Defendant allowed an exception.

A. It is not a normal condition; no.

(Testimony of L. V. Smith.)

(The plaintiff Pedrin bares his arm.)

Q. Examine that arm from the shoulder—

A. You see the action of this muscle is flex and you can extend the bone.

Q. Is that muscle and arm perfectly natural, that is, is there any displacement of the muscles?

A. There may be a stretching of this ligament here—there may [128—114] be a stretching of the long head of the biceps muscle.

Q. You think the action of that muscle is perfectly normal now?

A. The action of that muscle, its work, its function, is performed at present—that is my opinion.

Q. You think that he has just as much strength and the muscle is just as flexible as it was before the injury?

A. The muscle is performing the function, that is what I mean; as to the strength and power, etc., that is to be determined.

Q. You think the muscle is as flexible apparently as it was formerly?

A. The displacement may be due to the stretching of the limb.

Q. How do you account for the fact that the arm is larger here and is somewhat raised just above the elbow, how do you account for that fact,—that is not normal?

A. It may from the stretching of the long head of the biceps—doubling up on the short head; there are two attachments to the muscle, one to the shoulder joint, the other to the arm.

(Testimony of L. V. Smith.)

Q. And one of those has stretched?

A. The long head of the biceps muscle which attaches to the shoulder joint, that doubles the muscle, making the long head double on the short head—making the muscle bulge at the short head attachment.

Q. That is the cause?

A. That is the cause.

Q. That doesn't affect the use of the arm or strength at all?

A. As to the strength, I am not prepared to say, but as to the motion, the action of that muscle is not retarded in any way, as you can see—he has the action of the muscle, which is to flex and extend the arm.

Q. The normal arm, though, is fully as large here as your own [129—115] is and mine is?

A. Yes, it is the stretching of the ligament, in my opinion, and that doubles the two heads of the muscles upon itself, making the muscle bulge at the attachment to the short head of the biceps muscle.

Q. If the attachment in the course of stretching had been permanently weakened in some way, it would permanently affect the strength of the arm and its flexibility?

A. I don't know as to that—I don't quite get you.

Q. I say, if this stretching you speak of did displace the muscles to some extent, is there a possibility or even a probability that that would permanently weaken the arm or would impair the strength of it to some extent?

(Testimony of L. V. Smith.)

A. Well, the action of that muscle, it performs its function; as to the strength of the muscle, as you see, it is well developed. The last time I examined it, it was in a flabby condition; it is very firm now, but as to the power I couldn't give my opinion.

Q. It was about the last of May you saw him last?

A. It was about the last of May I saw him last—the muscle has developed considerably since then.

Q. Did you see him much after that?

A. I saw him around the works.

Q. What was he doing?

A. He was working there.

Q. Whereabouts on the works?

A. Well, the only place I see him was around on the dock shoveling coal and in the bunkers there. I passed him when I was going around the works—I see him out with the engineer passing as I was going down to the office. [130—116]

Q. Do you know when he left there?

A. The latter part of July or first of August.

Q. Now, these injuries that were shown on him when he first came to the hospital, were they painful or not? A. They were.

Q. Extremely so?

A. Well, a broken bone gives you considerable trouble and pain.

Q. You think he suffered a great deal of pain during the six weeks?

A. I didn't allow him to suffer any more than I could help.

Q. I mean the normal results of the injury, were

(Testimony of L. V. Smith.)

they such as would cause him a great deal of pain?

A. They would, without interference.

Q. That is the injuries he received were in themselves extremely painful, were they not?

A. They would be without attention.

Q. And the healing of this wound on his body, this laceration or cut, whichever you call it, and the one on his face, both of those would cause him considerable pain until they were well healed, would they not?

A. Not as much so as the break.

Q. And he was closely confined in the bed and not allowed to move much for twenty-one days?

A. Yes, sir.

Q. That is not a very comfortable position, is it?

A. No.

Q. You would say on the whole that the man did suffer a good deal of physical pain for several weeks?

Mr. BORYER.—We object to that.

By the COURT.—He may give his opinion. [131 117]

A. As to the suffering, I couldn't give my opinion as to that because I gave him plenty of opiates and tried to avoid that—and as to his actual suffering I couldn't give—I couldn't say.

Q. I am asking you as a medical man—doesn't a man necessarily suffer considerably from such injuries?

A. Certainly, from any break.

Witness excused.

Defendant rests.

The jury having been excused—

Mr. BORYER.—I desire to make the following motion for a directed verdict:

[Motion (in Bill of Exceptions) for a Directed Verdict.]

Comes now the defendant, the Beatson Copper Company, by its attorney, R. J. Boryer, and moves the Court to direct a verdict in favor of the defendant for the following reasons:

I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks, and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff. [132—118]

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any other manner trying to

ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

V.

For the further reason that the defendant in its affirmative defense alleges and pleads that if the plaintiff was injured, such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plaintiff himself or by the negligence of a fellow-servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting same.

After argument the motion was denied and defendant allowed an exception. [133—119]

Instructions of the Court.

Gentlemen of the Jury:

In this case the plaintiff alleges that he was employed by defendant as a mucker, in that portion of the mine of defendant company on Latouche Island, Alaska, known as the glory hole, an open pit or quarry; that plaintiff's duties required him to bulldoze or break up the rocks which had been blasted from the walls of said glory hole; that the rule required by safe mining and usually followed at defendant's said mine, that after a shot or blast had been fired in the walls of said glory hole that the loose rock or portions of said wall be examined and all loose fragments barred or pried loose with crow-bars, in order that it might be safe for plaintiff or other workmen in a similar capacity to work in safety beneath the said wall. That about February first, 1913, while plaintiff was so working, he was injured by a mass of rock falling upon him from above, which had been negligently permitted to remain in an unsafe and loosened condition by defendant. That plaintiff had no knowledge of the unsafe condition of said wall and was exercising reasonable and ordinary care and caution for his own safety. That plaintiff sustained injuries by reason of the negligent act of the defendant as alleged in the complaint in the sum of Ten Thousand Dollars.

Defendant by way of affirmative defense alleges in his answer that if the plaintiff was injured, that said injury arose and grew out of the risks incident to plaintiff's employment, which risks the plaintiff assumed; second, that said injuries, if any, were due

to the negligence of the plaintiff himself or the negligence of a fellow-servant, for which the defendant is not responsible. [134—120]

In cases of this kind a number of questions of law arise which have been the subject of much learned disquisition, disputation and expounding.

Possibly it would be better and more satisfactory if the whole subject could be simplified, and the whole subject of negligence, contributory negligence, fellow-servant rule and assumption of risk by employee, could be submitted to juries with the instruction to decide the case by the simple rules:

Was the accident the defendant's fault?

Was the plaintiff also in fault? If so, who was most to blame?

But this Court cannot brush aside the established laws of the land and while a case like this involves much labor on the part of the Court, you as jurors must patiently try to consider the various features of the case and the instructions on the law given you by the Court.

The general rule is in cases of this kind that where a servant is employed in a mine, quarry, tunnel pit, trench or other excavation, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work permits of, and while the servant assumes the ordinary risks of his employment, this does not ordinarily release the master from such duty.

The jury are instructed that it is the duty of an employer to exercise reasonable care to furnish em-

ployees with a reasonably safe place to work and with reasonably safe and suitable tools and appliances, and if he fails in any of these particulars, then he is guilty of actionable negligence. What constitutes [135—121] a safe place to work and safe appliances varies, to some extent, with the nature of the employment, and each case is to be decided within the general rules of law upon its own peculiar facts.

The duty of the master to furnish safe places for employees to work in and safe appliances to work with is a continuing one, to be exercised wherever circumstances require it.

The jury are instructed that it was incumbent upon the plaintiff to use reasonable and ordinary care and caution to observe open and obvious defects and dangers and such as would be disclosed by the exercise of ordinary care, but that he had the right to assume that the defendant had used due care to furnish him with a reasonably safe and suitable place for work.

DEFINITIONS:

“Negligence.” Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it.

The law makes distinctions in the degrees of negligence or want of care, but in this case you are instructed that the degree of care the defendant owed the plaintiff in providing him with a safe place in which to work, as explained to you in these instructions, was reasonable care—that is, such a de-

gree of care as an ordinarily reasonable and prudent man would have exercised under similar circumstances.

Contributory negligence means the want of care or prudence on the part of the person injured which is the efficient or proximate cause of the injury, and the law enjoins upon every [136—122] person the duty to exercise a reasonable care and prudence to avoid dangers which are patent and obvious or which such person knew of or could by the exercise or reasonable care and diligence have known.

Fellow-Servant:

The Court instructs the jury that in order to constitute servants of the same master fellow-servants, it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution.

You are further instructed that if you believe from a preponderance of evidence that the defendant was guilty of negligence, as alleged in the plaintiff's complaint, and the plaintiff, by reason thereof, was injured and damaged as claimed by him, and that he himself was guilty of no want or ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury.

Vice-principal:

You are instructed that when an injury results to

a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in the performance of a duty, the breach of which by the master in person would create a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the [137—123] scope of the apparent authority, the master is responsible in damages to the injured servant, if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if he is clothed with apparent authority to direct and command, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for injuries resulting from his imprudent conduct or negligent act.

The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman not in authority over him. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant but what is known in law as a vice-principal. Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work

cannot be shifted by the master, and the agent representing the master in the premises must perform that duty and if he fails through negligence, the negligence is that of the master.

Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers of his employment. That is, the dangers necessarily attendant upon the employment and hazard of accidents which may occur in course of its employment [138—124] after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have happened or the injury resulted but for the conditions arising from the employer's negligence. [Pltff.]

Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master and he cannot delegate them to a servant and

then escape liability if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master, the one to whom he intrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties. [Pltff.] [139—125]

A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the belief that the master will not allow needlessly unsafe conditions to exist. [Pltff.]

You are instructed that before the plaintiff can recover in this action, it is necessary for him to prove by a preponderance of the evidence not only that the master was negligent, but also that his negligence was the cause of the injuries to the plaintiff, and this obligation is not discharged by merely showing the existence of a defect or the happening of the accident or injury. [Defendant's instructions given.]

You are instructed that the plaintiff alleges in his complaint that he is a miner by occupation, at which employment he was able to earn, and when opportunity offered did receive, the highest going wages as a miner, therefore you are instructed that the plaintiff assumes all patent and obvious risks of his employment which he has sufficient intelligence to

understand and appreciate, and knew of the danger of working under such conditions. [Defendant's instructions given.]

You are instructed that before you can find that shift boss or foreman Green was a vice-principal and that it was his duty as such foreman to provide a reasonably safe place for the men under his direction to work and to see and provide after a shot was fired in the wall of the glory hole no loosened fragments [140—126] were allowed to remain upon the wall from which they might without warning be detached, it is necessary that you first find from the evidence introduced by the plaintiff that the defendant corporation intrusted this duty upon this foreman, and unless you find from the evidence that the defendant corporation did delegate to shift boss or foreman Green the duty of providing the place for work for the plaintiff and require of him to provide that after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain on the wall, you are instructed the plaintiff cannot recover in this action by reason of any negligence of shift boss or foreman Green. [Defendant's instructions given.]

You are instructed that it being the duty of the master to furnish a reasonably safe place and safe tools and appliances to work with, as explained in these instructions, it was the duty of the defendant in this case to keep the walls of the pit where plaintiff was working, in a reasonably safe condition, so far as the nature of the work permitted, and this duty could be performed in a case like that where the defendant is a corporation, only by hiring and

instructing some person or persons to attend to this duty, and if you believe from the evidence that the plaintiff himself had been instructed in this regard, and had been told by his employer that it was a part of his work and duty to personally see that the walls were free from loose, hanging rock, before going to work near or under such walls, to "bar them down," and the plaintiff negligently and without using reasonable and ordinary care failed to perform this duty, then he was guilty of contributory negligence which was the direct and proximate cause of his own injury, and he cannot recover in [141—127] this case, and your verdict should be for the defendant.

If, however, you believe from the evidence that this duty was by the defendant company imposed upon the foreman Green, or any other employee of the defendant company than plaintiff, and the plaintiff knew this, then the plaintiff had a right to assume that such duty had been performed by such person so instructed, and he would not be guilty of such contributory negligence as would prevent his recovery, unless he knew the wall was at the time of his injury in an unsafe and dangerous condition, and he disregarded such danger and failed to use reasonable care and unnecessarily exposed himself to such danger, or unless the danger from loose, hanging rock was so obvious and patent that the plaintiff, by the use of reasonable and ordinary care, could and should have observed it.

You are further instructed that before the plaintiff can recover damages from the defendant, he must establish by a preponderance of the evidence all of the material allegations of his complaint, and must

so establish that the loose rock which fell upon and injured him was loosened by blasting shortly before the injury occurred, and that the defendant was guilty of negligence which was the direct cause of the injury to plaintiff in not taking reasonable precautions to have the walls of said pit or glory hole examined, after such blasting, and so render the place where plaintiff was working reasonably safe, as explained to you in these instructions.

On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of [142—128] the plaintiff's complaint are true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit, that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable so to do.

In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and

must prove the same by a preponderance of the evidence. And in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all the affirmative allegations set up in its answer.

The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at issue, you should determine that question or issue against the one having the affirmative of that particular question or issue. [143—129]

The jury are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant was negligent in not providing a safe and suitable place for the plaintiff to work in, as explained to you in these instructions; that in consequence of such negligence plaintiff received the injuries complained of in the manner and form alleged in the complaint, and while the plaintiff was in the exercise of ordinary care and caution for his own safety.

You are the exclusive judges of the credibility of the witnesses and of the effect and value of their testimony. But your power of judging the effect of evidence is not arbitrary but to be exercised with legal discretion and in subordination to the rules of evidence, as given to you in these instructions.

You are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds against a less number or against a presumption or other evidence

satisfying to your minds.

If a witness testifies falsely in one part of his evidence, you may distrust him in any other parts of his evidence, but you should give effect to such parts as you believe and disregard the parts you believe to be false.

In judging of the credibility of the witnesses you should consider the appearance of the witness upon the stand; his apparent candor and inclination to tell the truth or otherwise; the probability of his story; the opportunity he had of seeing or knowing the things about which he testified and also the interest, [144—130] if any, such witness has in the result of the case.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust.

It is your duty to accept the law of this case as given to you in these instructions, and if the Court should be in error as to any question of law upon which you are instructed, the party aggrieved has his remedy by having the case reviewed by the appellate court. You should take and construe these instructions as a whole, and not simply pick out certain portions of them.

You should not be moved by any influence of sym-

pathy, prejudice or passion, fear or favor, but aim solely at determining the truth of this matter from the evidence and the law as given you by the Court.

In considering your verdict you should listen to the reasons and arguments of each other in a reasonable and fair state of mind and not assume an attitude of stubbornness and unwillingness to listen with an open mind to the arguments and reasons of your fellow-jurors. [145—131]

You will take with you to your jury-room the pleadings in the case, as well as these instructions, for your guidance.

I also hand you two forms of verdict, the first one finding for the plaintiff and against the defendant, with a blank space which you will fill in with the amount of damages you find for the plaintiff, in case you should so find; and, second, a verdict in favor of the defendant and against the plaintiff on all the issues.

FRED M. BROWN,

District Judge. [146—132]

**[Official Stenographer's Certificate to Transcript of
Testimony.]**

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such official stenographer I reported the proceedings in the trial of the above-entitled cause, to wit, John Pedrin versus Beatson Copper Company, a Corporation; that the above is a full, true and correct transcript of the shorthand notes taken by me at said trial.

Dated, Valdez, Alaska, December 6, 1913.

ISAAC HAMBURGER. [147]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

vs.

Plaintiff,

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17 day of December,
A. D. 1913.

FRED M. BROWN,

Judge.

Filed in the District Court, Territory of Alaska,
Third Division. Dec. 17, 1913. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [148]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

vs.

Plaintiff,

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Instructions Requested by Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 11, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [149]

DEFENDANT'S REQUESTED INSTRUCTIONS.

No. I of Defendant's Instructions Accepted by Judge and Presented With His Instructions to Jury. [150]

You are instructed that the plaintiff bases his cause of action upon the defendant's negligence in that the plaintiff claims that the defendant negligently, recklessly and wantonly failed and neglected to make sufficient examination of the wall in the glory hole where the plaintiff was working after shots had been fired in said glory hole and to bar down all loose rock and earth adhering to said wall, or to remove from the wall all loose portions unsettled by the shots mentioned in the complaint. You are instructed that before the plaintiff can recover in this action it will be necessary for him to prove by the preponderance of the evidence that the defendant did not make sufficient examination of the wall complained of in the complaint, from which the rock and earth had been detached, and prove that at or before the time he entered this place to perform his work that there was loose rock and earth adhering to the wall, and must further prove that the defendant failed to remove from the wall all loose portions unsettled by the shots mentioned in the complaint and still adher-

ing to the wall, and unless the plaintiff establishes these facts by the preponderance of the evidence, you are instructed he cannot recover in this action.

Refused.

II.

[151]

You are instructed that before the plaintiff can recover in this action he must show that he exercised ordinary and reasonable care, that is, such care as an ordinary, prudent person would exercise under the same circumstances, the degree of care which must be taken by the plaintiff must be adjusted to the character of the work and it should be commensurate with the dangers of the employment.

Refused—Covered by Other Instructions.

III.

[152]

You are instructed that if you find from the evidence there was a rule in existence at the defendant's mine requiring all workmen to examine the place or places where they were working to see that such places were safe to work in and about, you are then instructed that the law presumes this rule was known to the plaintiff at the time he was injured and when he entered the place where he was injured.

Refused.

IV.

[153]

You are instructed that if it was the duty of the plaintiff to make safe or assist in making safe the place where he was working as the work progressed,

then the plaintiff cannot recover in this action.

Refused.

V.

[154]

You are instructed that if it was the duty of the plaintiff to assist and help to bar down the loose earth, gravel and rock that caused his injury and he failed to do so, the plaintiff cannot recover in this action.

Refused.

VI.

[155]

You are instructed that it was the duty of the plaintiff in this case to exercise that degree of care commensurate with the character of his occupation, which a reasonably prudent person would employ under like circumstances in order to protect himself from injury; and, if he fails to exercise this care, he cannot recover of the defendant for an injury to which his own negligence has contributed, even though the defendant has failed to exercise due care on his part. The plaintiff cannot recklessly expose himself to known danger, or to a danger which an ordinary prudent and intelligent man would, in his situation, have known, and then recover of the master for an injury his own recklessness has caused.

Refused.

VII.

[156]

You are instructed that the plaintiff alleges in his complaint that he was a miner and capable of earning the highest going wages paid to miners when opportunity offered, therefore he cannot recover for

his injuries if same were caused by his inattention to his surroundings and failure to take due precautions against known or obvious dangers.

Refused.

VIII.

[157]

You are instructed that if it was the duty of the plaintiff in this action to inspect the place where he was working to see if it was safe to work at the place or point where he was working, and he failed to make this inspection, you are instructed he cannot recover in this action.

Refused.

IX.

[158]

You are instructed that if the plaintiff knew, or if the dangers connected with the work were so patent and obvious that he either knew, or in the exercise of ordinary care should have known of their existence, he assumes the risk of injury from the dangers and defects of which he complains of in his complaint.

Refused.

X.

[159]

You are instructed that the plaintiff assumed the risk incident to his employment although he did not have absolute knowledge of the risks, if they were such that an ordinary, prudent man, under the circumstances would, by reasonable diligence, have discovered them.

Refused.

XI.

[160]

You are instructed that where a miner or experienced servant voluntarily places himself in a position of danger not called for by the nature of his employment, he is guilty of contributory negligence and cannot recover.

Refused.

XII.

[161]

You are instructed that if the plaintiff had actual or constructive knowledge of the dangers or unsafe condition of the place and he failed to take such precautions as a reasonably prudent man under similar circumstances would exercise to avoid the dangers, and is injured by reason of his failure to use such ordinary care, he is guilty of contributory negligence and cannot recover in this action.

Refused.

XIII.

[162]

You are instructed that if the plaintiff continued work with knowledge actual or constructive of the dangers regarding the place where he was working, where an ordinary prudent man would not work or subject himself to, he is guilty of contributory negligence and cannot recover in this action.

Refused.

XIV.

[163]

You are instructed that all persons who serve the same master, work under the same control, deriving authority and compensation from the same source and are engaged in the same general business, al-

though it may be in different grades or departments of it, are fellow-servants.

Covered by other instructions.

XVI.

[164]

You are instructed that if the defendant by any of its agents or servants, carefully examined the glory hole after the shots alleged in the complaint were fired and the person or persons making this examination thought or pronounced it safe, and such person or persons were coworkers and fellow-servants of the plaintiff, you are instructed the plaintiff cannot recover in this action.

Refused.

XVII.

[165]

You are instructed that the plaintiff alleges in his complaint that “he is a miner by occupation, at which employment he was able to earn when opportunity offered, and had earned and received, the highest wages as a miner.” This allegation you must consider as true as there has been no evidence offered by the defendant to contradict this allegation. Therefore, if you find from the evidence that the plaintiff prior to receiving the injuries complained of had knowledge, or from his experience and knowledge imputed to him as a miner, had knowledge of facts such as would lead a man of his experience and knowledge to believe that there was danger of injury from falling rocks and earth at the place where the injury occurred, and with such knowledge he continued to work without notifying the proper officers

of the defendant company of such danger and while continuing to work at this place received the injury complained of, then, in that case, you are instructed the plaintiff cannot recover in this action.

Refused.

XVIII.

[166]

You are instructed that before you can find for the plaintiff, the plaintiff must show that the defendant failed or neglected to make an examination of the place complained of in the complaint as being dangerous and which caused the plaintiff's injuries.

Refused.

XIX.

[167]

You are instructed that if you find from the evidence that it was the duty of the plaintiff and his fellow-workmen to make safe the place of work as it progressed and to bar down all loosened rock and earth after shots had been fired, the master's or defendant's duty is fulfilled when he furnishes them with suitable material and implements for doing this work, and if the plaintiff or any or his fellow-servants failed or neglected to make the place safe, or failed to bar down the loose earth and gravel which caused the plaintiff's injury, he cannot recover in this action.

Refused—Covered in other instructions.

XXI.

[168]

XXII.

You are instructed that the plaintiff in this case has introduced in evidence that by the rules of the

defendant company it was the duty of the plaintiff along with the other men working with him to assist in and bar down the loose rock, earth and gravel left after the shots had been fired, the plaintiff having introduced this in evidence he is bound by it where there is no evidence to the contrary, therefore you are instructed if this rule made it the duty of the plaintiff to assist in and bar down the loose rock, earth and gravel that fell and injured him and he failed, neglected or refused to do so and was injured by reason of said earth, rock and gravel falling down and striking him, you are instructed he cannot recover in this case.

Refused—Covered in other instructions.

XXIII.

[169]

You are instructed that the plaintiff failed to introduce in evidence what if any power or authority the shift boss or foreman Green had, or what authority or power or what duties the defendant company had entrusted to him, or that he had authority or right to give any order or command which violated any rule of the company or prevented any rule of the company being carried out, or that he had authority or it was his duty to see or do anything regarding the safety of the place where the men were working; therefore, you are instructed that if the rules of the defendant company required the plaintiff, along with the other men working with him, to assist in and bar down the loose earth, rock and gravel left after the shots had been fired, you are instructed that it was the duty of the plaintiff to assist in and bar down the loose earth, rock and

gravel that afterwards fell and struck him causing the injury, and this is true although the shift boss or foreman Green instructed him to start bulldozing, and if he failed or neglected to bar down the loose rock earth and gravel that struck him, he cannot recover in this action.

Refused.

XXIII.

[170]

XXIV.

You are instructed that the plaintiff has failed to introduce or show in evidence that the shift boss or foreman Green advised or told the plaintiff that he need not bar down the loose rock and earth that the plaintiff claims struck him or that anyone else told him this or informed him that the shift boss or foreman Green had said not to bar down the loose rock and gravel that struck the plaintiff, therefore you are instructed that if the rule of the company required that he do or assist in barring down this earth, you are instructed that it was the duty of the plaintiff to do so, although the foreman had advised him to begin bulldozing, and if he failed to bar down said earth, rock and gravel and was injured by reason of said earth, rock and gravel not being barred down, you are instructed he cannot recover in this action.

Refused.

XXIV.

[171]

XXV.

You are instructed that no evidence was introduced showing that the earth which struck the plain-

tiff causing the injury was earth or rock that had been loosened by the shots that had been fired at the times alleged in the complaint to have been fired or that the earth and rock which struck the plaintiff was earth and rock that should have been barred down or looked after by the defendant, and before you can find for the plaintiff in this case it is necessary that he prove that the earth and rock which struck him was earth and rock that had been loosened by the shots complained of in the complaint and that should have been barred down, and unless you so find from the evidence introduced in this case, you are instructed the plaintiff cannot recover.

Refused—Covered in other instructions.

XXV.

[172]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

vs.

BEATSON COPPER COMPANY, a Corporation.

Verdict.

We, the jury duly empaneled and sworn in the above-entitled action, do find for the plaintiff and assess his damages at the sum of \$4,000.00.

J. J. MILLER,

Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 11, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 7, page 452. [173]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff.

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Judgment.

This cause came on for trial on the 11th day of November, A. D. 1913, at the Special October, 1913, term of the above-entitled court, the plaintiff appearing in person and by his counsel, E. E. Ritchie, and the defendant appearing by its counsel, R. J. Boryer, and a jury of twelve men was duly selected, impaneled and sworn to try the cause. The parties introduced their evidence and rested and after arguments by counsel and instructions by the Court, the jury retired on the 12th day of November, A. D. 1913, to consider of their verdict. Thereafter, on the same day, the jury returned into court with their verdict, whereby they found for the plaintiff and against the defendant and assessed plaintiff's damages at \$4,000.00.

On the 13th day of November, A. D. 1913, the defendant filed a motion for judgment notwithstanding their verdict and a motion for a new trial, which motions were on the same day argued by counsel and each of them by the Court denied, to which rul-

ings of the Court defendant by its counsel then and there excepted.

WHEREFORE by reason of the law and the premises hereinbefore recited,

IT IS ORDERED AND ADJUDGED by the Court that [174] the said plaintiff do have and recover from the defendant the sum of Four Thousand Dollars (\$4,000.00) and his costs in this action, taxed at \$64.00.

Dated at Valdez, Alaska, this 14th day of November, A. D. 1913.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. 7, page No. 464. [175]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Defendant's Exceptions to Court's Instructions to Jury.

This cause having come on to be heard on the 10th day of November, 1913, and having been submitted

to jury on the 11th day of November of same year, and it having been stipulated between the attorneys for plaintiff and defendant in the presence of the jury before it had retired and in the presence of the Court that the plaintiff and defendant have until the 16th day of November, 1913, to make and take exceptions to instructions given and refused and to the trial of said cause,—

Now, on this the 14th day of November, 1913, the defendant makes the following exceptions:

I.

Defendant excepts to instructions given on page 8, for the reason that said instructions are not the proper and correct test or rule to determine who are fellow-servants and master's liability and are contrary to law; said instructions are as follows:

“FELLOW-SERVANT.

“The Court instructs the jury that in order [176] to constitute servants of the same master fellow-servants it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution.

“You are further instructed that if you believe from a preponderance of evidence that the defendant was guilty of negligence, as alleged in the plaintiff's complaint, and the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defend-

ant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury.”

II.

Defendant excepts to instruction given on page 9, for the reason that said instruction only requires the servant to have apparent authority in order to bind the master for some negligent act of the servant done regarding the positive duties of the master and that are lodged in the master to do or delegate and is contrary to law; said instruction is as follows:

“VICE-PRINCIPAL.

“You are instructed that when an injury results to a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in the performance of a duty, the breach of which by the master in person would create a liability, and he is clothed [177] with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority, the master is responsible in damages to the injured servant, if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if he is clothed with apparent authority to direct and command, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for injuries resulting from his imprudent conduct or negligent act.

II Brickwood—Sackett 1439.”

III.

Defendant excepts to instruction given on page 10, for the reason that said instruction is erroneous and contrary to law in that it states that employees cannot be fellow-servants with other employees who are in authority over them, which instruction is as follows:

“The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman not in authority over him. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant but what is known in law as a vice-principal. Any duty which the master is bound to perform for the safety of his servants he cannot escape [178] responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work cannot be shifted by the master and the agent representing the master in the premises must perform that duty, and if he fails through negligence, the negligence is that of the master.”

IV.

Defendant excepts to instruction given on page 11, for the reason that said instruction is contrary to law in that it requires the master to furnish a safe place to work which instruction is as follows:

“Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers

of his employment. That is, the dangers necessarily attendant upon the employment and hazard of accidents which may occur in course of its employment after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have happened or the injury resulted but for the [179] conditions arising from the employer's negligence."

V.

Defendant excepts to instruction given on page 12, for the reason that it informed the jury that certain duties of the master are nondelegable and the master cannot escape them if delegated to a servant, but said instruction does not inform the jury what duties can and what duties cannot be delegated and also informed them that if the defendant in this case delegated one of said nondelegable duties to two men

who were fellow-servants and one of them was injured by reason of the carelessness of the other, the one could recover, said instruction is as follows:

“Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master and he cannot delegate them to a servant and then escape liability if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master the one to whom he intrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties.”

VI.

Defendant excepts to instruction given on page 13, for the reason that it relieves the servant of the responsibility of using the care required by law of him, said instruction is as follows:

“A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care [180] to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the belief that the master will not allow needlessly unsafe conditions to exist.”

VII.

Defendant excepts to instruction given on page 16, for the reason that no evidence was introduced showing plaintiff's expectancy or probable length of life,

which instruction is as follows:

“On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of the plaintiff’s complaint are true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit, that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable so to do.” [181]

VIII.

Defendant excepts to instruction given on page 17, for the reason that said instruction required the defendant to prove by the preponderance of the evidence its affirmative defenses set up in its answer and not denied or replied to by the plaintiff, which instruction is as follows:

“In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and

must prove the same by a preponderance of the evidence; and in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all of the affirmative allegations set up in its answer.

“The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at issue; you should determine that question or issue against the one having the affirmative of that particular question or issue.”

IX.

Defendant excepts to refusal of Court to give instruction No. 2 requested by defendant.

X.

Defendant excepts to refusal of Court to give instruction No. 3 requested by defendant.

XI.

Defendant excepts to refusal of Court to give [182] instruction No. 4 requested by defendant.

XII.

Defendant excepts to refusal of Court to give instruction No. 5 requested by defendant.

XIII.

Defendant excepts to refusal of Court to give instruction No. 6 requested by defendant.

XIV.

Defendant excepts to refusal of Court to give instruction No. 7 requested by defendant.

XV.

Defendant excepts to refusal of Court to give instruction No. 8 requested by defendant.

XVI.

Defendant excepts to refusal of Court to give instruction No. 9 requested by defendant.

XVII.

Defendant excepts to refusal of Court to give instruction No. 10 requested by defendant.

XVIII.

Defendant excepts to refusal of Court to give instruction No. 11 requested by defendant.

XIX.

Defendant excepts to refusal of Court to give instruction No. 12 requested by defendant.

XX.

Defendant excepts to refusal of Court to give instruction No. 13 requested by defendant.

XXI.

Defendant excepts to refusal of Court to give instruction No. 14 requested by defendant. [183]

XXII.

Defendant excepts to refusal of Court to give instruction No. 16 requested by defendant.

XXIII.

Defendant excepts to refusal of Court to give instruction No. 17 requested by defendant.

XXIV.

Defendant excepts to refusal of Court to give instruction No. 18 requested by defendant.

XXV.

Defendant excepts to refusal of Court to give in-

struction No. 19 requested by defendant.

XXVI.

Defendant excepts to refusal of Court to give instruction No. 21 requested by defendant.

XXVIII.

Defendant excepts to refusal of Court to give instruction No. 22 requested by defendant.

XXIX.

Defendant excepts to refusal of Court to give instruction No. 23 requested by defendant.

XXX.

Defendant excepts to refusal of Court to give instruction No. 24 requested by defendant.

XXXI.

Defendant excepts to refusal of Court to give instruction No. 25 requested by defendant.

R. J. BORYER,

Attorney for Defendant.

Exceptions allowed.

FRED M. BROWN,

Judge.

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 14, 1913. Arthur Lang, Clerk.
By Chas. H. Hand, Deputy. [184]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

**Motion for Judgment for Defendant Notwithstand-
ing Judgment for Plaintiff.**

Defendant, by its attorney, moves the Court to enter judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict returned in the case, for the following reasons:

1.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

a. The jury was not justified in finding the defendant guilty of any negligence as alleged by the plaintiff, nor in finding against said defendant.

b. That the plaintiff alleged in his complaint that his regular occupation is that of a miner, at which employment he was able to earn and had earned and received the highest going wages as a miner; that while employed as a mucker for defendant in its mine, in a glory hole, he was struck by some earth and rock that fell from the side of a bank that had been loosened by a dynamite charge and that had not been barred down; that the recognized rules of careful and safe mining require that said walls

be barred down and that duty devolves upon the mine operator and his vice-principal, the foreman or the shift boss directing the work.

The evidence introduced by the plaintiff shows that: [185] The plaintiff was an experienced miner. That he had been working in the glory hole for two weeks; knew that the shots had been fired just prior to going to dinner. That he returned immediately after dinner and resumed work under or near the place where the shot or shots had been fired, and did so without making an examination and without taking any precautions whatever, and against the evidence introduced by him in not barring down the loose earth that he complained of, although he and the other witnesses who were called by the plaintiff testified that it was his duty to bar down the loose earth.

Plaintiff claims he resumed work after dinner, bulldozing rock, by reason of the orders of shift boss or foreman Green. No evidence was introduced that this shift boss or foreman had been instructed or empowered to do any of the positive duties required of the defendant; no evidence was introduced connecting the earth that struck plaintiff with that loosened by the shots complained of or connected with the work.

That the verdict is against the law and evidence.

WHEREFORE defendant prays for judgment notwithstanding the verdict.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [186]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Order Overruling Motion for Judgment for Defendant Notwithstanding Judgment for Plaintiff.

Defendant's motion for judgment in favor of the defendant notwithstanding judgment returned by jury in favor of plaintiff having come on to be heard on the 13th day of November, 1913, the same having been argued by attorneys for plaintiff and defendant, and having been duly considered by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion be and the same is hereby denied, to which defendant excepts and exception is allowed.

Done this the 14th day of November, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 7, page No. 465.
[187]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Motion for New Trial.

Comes now the defendant by its attorney and moves the Court that if it denies its motion for judgment in favor of defendant notwithstanding verdict in favor of the plaintiff, that the Court vacate the verdict found by the jury in this action and grant the defendant a new trial in this action for the following reasons which materially affect its substantial rights, to wit:

I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

(a) That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

(b) That the plaintiff based his cause of action upon the following facts: That on or about February 1st, 1913, plaintiff while employed by defendant

company was at work in glory hole of defendant's mine; that he went to dinner about 11:30 P. M. and returned to work about 12:30 A. M.; that after quitting work to go to dinner at 11:30 P. M. a shot was fired in the glory hole which further loosened some rock, gravel, and earth that had been loosened prior to his [188] going to work at 7 P. M. of that day; that when he returned from dinner about 12:30 A. M. he was ordered by the shift boss or foreman to resume immediately his work of bulldozing at the bottom of the glory hole, and while so employed some rock and earth loosened by the shot in the afternoon and further loosened by the shot fired between the hours of 11:30 P. M. and 12:30 A. M. in a wall adjacent to where the afternoon shot had been fired, fell on him causing the injury complained of in the complaint; that he was under the immediate orders and direction of one Green, who was a shift boss or foreman, and whose duty it was to have barred down the loose rock and gravel that struck and injured him.

(c) Defendant denies all of the above allegations except that plaintiff was employed by defendant, and sets up affirmative defense of contributory negligence, assumption of risk and fellow-servant; plaintiff filed no reply denying the above defenses.

(d) Plaintiff failed to show that any shot had been fired in the afternoon before he began work on his shift and failed to show that any earth had been loosened in the afternoon that should have been barred down, and failed to show that any earth or rock that should have been barred down or that was

loosened by any shot is the earth and rock that struck the plaintiff and injured him, and failed to show that defendant had examined the place.

(e) Plaintiff failed to show the relation of the foreman or shift boss Green to the defendant company and what authority he had or what duties and obligations had been given or delegated to him, and what his duties were.

(f) Plaintiff's own evidence shows that Van Campen was superintendent and manager of said mine; that Green was only a shift boss or foreman; that the plaintiff was an experienced miner capable of earning the highest wages as a miner; that he knew that the shots were fired and that he [189] resumed work without examining the walls or place where he was working; that during the first part of his shift he was bulldozing large rocks with powder in the bottom of the glory hole; that it was part of his duty along with the other workmen to bar down rock, gravel and earth loosened by the firing of shots; that it was a rule of the company that before going to work it was the duty of plaintiff and other workmen to examine the place and if any loose rock or earth was found to bar it down; that he worked from the time of coming out of the hospital until he quit the employment of the company.

II.

That the verdict is against the evidence and the law.

III.

That the amount of damages allowed is excessive and was influenced by passion or prejudice.

IV.

Errors of law occurring in the trial and exceptions made by defendant.

V.

Accident or surprise by which ordinary prudence could not have guarded against.

VI.

In denying defendant's motion for a nonsuit.

VII.

In denying defendant's motion for a directed verdict.

VIII.

For the further reason that the instruction on page 8 regarding who are fellow-servants and right of recovery is erroneous and not the law determining who are fellow-servants.

IX.

For the further reason that the instruction given on page 9 is erroneous and not correct law regarding servant's authority.

X.

For the further reason that the instruction given on [190] page 10 is contrary to law, in that it instructs that in order for employees to be fellow-servants they must all be of the same rank of employees, and one in authority over the plaintiff could not be a fellow-servant.

XI.

For the further reason that the instruction given on page 11 is erroneous, in that it requires the master to furnish a safe place to work.

XII.

For the further reason that the instruction given on page 12 is confusing and incomplete, in that it fails to instruct or tell the jury what certain personal duties are nondelegable.

XIII.

For the further reason that the instruction given on page 13 is contrary to law.

XIV.

For the further reason that the instruction given regarding damages instructs so that the jury might base damages on plaintiff's expectancy or probable length of life when no evidence was introduced as to plaintiff's expectancy or probable length of life.

XV.

For the further reason that the instruction requiring the defendant to prove by the preponderance of evidence its affirmative defense when no reply had been filed or served denying them is erroneous and contrary to law, and instructed the jury that it was the duty of the defendant to prove that the plaintiff was a fellow-servant with the one who caused his injury.

WHEREFORE defendant requests that a new trial be granted in this action.

R. J. BORYER,

Attorney for Defendant. [191]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [192]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Order Overruling Motion for New Trial.

Defendant's motion for new trial having come on to be heard this the 13th day of November, 1913, and the same having been argued by the attorneys for plaintiff and defendant and duly considered by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion for a new trial be and the same is hereby denied, to which defendant excepts and exception is allowed.

Done this the 14th day of November, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. Entered Court Journal No. 7, page No. 465. [193]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpora-
tion,

Defendant.

**Stipulation [Extending Time Forty Days to File Bill
of Exceptions].**

It is hereby stipulated by and between the attorneys for plaintiff and defendant that the plaintiff have 40 days from the time of the signing and filing of the judgment in this case to prepare, file and present its bill of exceptions and its cost and supersedeas bond for an approval and filing, and that execution on said judgment be stayed in the meantime.

Dated this the 13th day of November, A. D. 1913.

E. E. RITCHIE,

Attorney for Plaintiff.

R. J. BORYER,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

[194]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

**Order Extending Time for Signing and Filing Bill
of Exceptions, etc.**

Defendant having moved the Court for an extension of time in which to settle, sign and file bill of exceptions in the above-entitled action, and also to file Cost and Supersedeas Bond and for Stay of Execution, having come on to be heard and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant have forty days from the time of the signing and filing of the Judgment in this case to prepare, file and present its Bill of Exceptions and settling same and Cost and Supersedeas Bond and that execution on said judgment be stayed in the meantime.

Dated this the 14th day of November, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1913.

Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 7, page No. 464. [195]

[Minutes of Trial—November 10, 1913.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corp.,
Defendant.

Trial by Jury.

Now, on this day, this cause came on regularly for trial; R. J. Boryer appearing for the defendant and E. E. Ritchie appearing for plaintiff; and both sides announcing their readiness for trial, the following proceedings were had and done, to wit: The jury, sworn and selected, are as follows:

- | | |
|------------------|---------------------|
| 1. M. Shinn, | 7. Dan Wilcey, |
| 2. Geo. Steward, | 8. James Fish, |
| 3. D. W. Harvey, | 9. Chas. McCallum, |
| 4. J. J. Miller, | 10. H. A. Ives, |
| 5. E. L. Judson, | 11. A. J. Meals, |
| 6. T. J. Lane, | 12. Elmer Anderson, |

WHEREUPON statement was made by E. E. Ritchie, attorney for the plaintiff. Defendant waives statement.

WHEREUPON John Pedrin was sworn and testified in his own behalf.

WHEREUPON John Smith was sworn and testified on behalf of the plaintiff.

WHEREUPON Frank M. Boyle was sworn and testified on behalf of plaintiff.

WHEREUPON John Smith was recalled and testified further on behalf of the plaintiff. [196]

WHEREUPON Wm. Gleason was sworn and testified on behalf of the plaintiff.

WHEREUPON plaintiff rests.

WHEREUPON the plaintiff having submitted the testimony in support of its cause of action and rested and the defendant, at the close of plaintiff's cause, having moved the Court for a judgment of nonsuit against the plaintiff, and the matter having been argued by counsel, the Court takes said motion under advisement to report at the hour of ten o'clock to-morrow.

Whereupon, it being the hour of adjournment and the testimony of the witnesses being incomplete,

It is ordered that the further trial of this cause be continued until to-morrow at the hour of ten o'clock A. M.

Entered Court Journal No. 7, page No. 449.

Special October, 1913, Term—Nov. 10th—23d Court Day. Monday. [197]

[Minutes of Trial—November 11, 1913.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corp.,
Defendant.

Trial Continued.

Now on this day the trial of the above-entitled cause came on again regularly for trial; E. E. Ritchie appearing as attorney for the plaintiff; R. J. Boryer appearing as attorney for the defendant; came the jury heretofore impaneled and sworn herein and being called and each answering to his name, the following proceedings were had and done, to wit:

WHEREUPON, the Court being fully advised in the premises gives his decision and denies said motion for a judgment of nonsuit, and exception is taken and allowed.

Whereupon L. V. Smith was sworn and testified on behalf of the defendant.

Whereupon defendant rests.

Whereupon the plaintiff, offering no testimony in rebuttal, defendant files his written motion for a directed verdict, which said motion is by the Court denied, and exception taken and allowed.

Whereupon arguments were had by counsel for plaintiff and counsel for defendant, the jury are duly

instructed by the Court as to the law in the case, and retire in charge of their sworn bailiffs for deliberation.

Thereafter said jury returning into court, in charge of their sworn bailiffs, and being called and each [198] answering to his name, present by and through their foreman, in their presence, their verdict, which is in words and figures as follows, to wit:

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN

vs.

BEATSON COPPER COMPANY, a Corp.,

Verdict.

We, the jury duly empaneled and sworn in the above-entitled action, do find for the plaintiff and assess his damages at the sum of \$4,000.00.

J. J. MILLER,

Foreman.

—which said verdict is ordered filed and entered by the Clerk and the jury is excused from further deliberation herein.

Entered Court Journal No. 7, page No. 452.

Special October, 1913 term—Nov. 11-24th Court Day. Tuesday. [199]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Petition for Writ of Error.

Comes now the Beatson Copper Company, a corporation, the defendant herein, and complains and states that on the 14th day of November, A. D. 1913, the above-entitled court entered judgment herein in favor of the plaintiff above named, and against the defendant above named, in which judgment, and in the proceedings had prior thereto in the above-entitled cause, certain errors were committed to the prejudice of this defendant, all of which will appear in the detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court [200] of Appeals for the Ninth Circuit.

And defendant further prays for an order fixing

the amount of bond for a supersedeas in said cause.

Dated this the —— day of December, A. D. 1913.

R. J. BORYER,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska,
Third Division. Dec. 17, 1913. Arthur Lang,
Clerk. By K. L. Monahan, Deputy. [201]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpora-
tion,

Defendant.

Assignment of Errors.

Comes now the defendant below and plaintiff in error in the above-entitled cause and files the following Assignment of Errors upon which it will rely in its prosecution of the Writ of Error in the above-entitled cause:

I.

The Court erred in overruling challenge of plaintiff in error to Juror W. Thomas, to which ruling plaintiff in error duly excepted and its exception was allowed. Said exception is based upon the following testimony:

“Mr. BORYER.—Q. You have heard the case talked of?

A. I heard some of the boys speak of it down here.

Q. Heard who?

A. One of the boys that worked down at the mine.

Q. Did he go into details, how it happened?

[202] A. No.

Q. Where was it you heard this conversation?

A. Here in Valdez.

Q. Between whom? A. Mr. Florence.

Q. Who was doing the talking, the plaintiff?

A. No.

Q. Do you recall who it was?

A. Florence was the party's name that was telling me about it—I think he happened to be working down there last winter.

Q. From what you have heard do you feel that you could sit as a juror in this case?

A. I can't say that I should sit; no.

Q. You think you have formed impressions from what you have heard that it would take evidence to remove? A. To a certain extent, yes.

Q. And you don't feel then that you should sit as a juror? A. Why, no, I do not.

Q. You have formed an opinion from what you heard at that time? A. Slightly.

Q. It would take some evidence to remove it?

A. Some evidence.

Mr. BORYER.—We challenge the juror for cause.
(By Mr. RITCHIE.)

Q. So you have now you think an opinion as to the merits? A. Yes, somewhat. [203]

Q. So that you could not start on the trial of the

case as an absolutely impartial juror?

A. No, I could not.

Q. Suppose at a very early stage of the trial it appeared that the purported facts already stated to you were wholly wrong could you then try the case as though you had never heard anything regarding it? A. Yes.

By the COURT.—Do you feel that you could lay aside any opinion you may have and absolutely disregard it and try the case and decide it entirely on the evidence that you hear here in the courtroom?

A. Yes, sir.

By the COURT.—The challenge will be denied.

Defendant is allowed an exception to the ruling.”

II.

The Court erred in refusing to instruct the jury to disregard the following testimony of John Pedrin, for the reason that same was hearsay, to which the plaintiff in error duly excepted and its exception was allowed. The testimony was as follows:

“Mr. RITCHIE.—Q. Now, just tell the jury what injuries you received, tell how you were hurt, every hurt you had. [204]

A. I got a cut here (indicating).

Q. How big was that cut on the face at the time?

A. They told me it was right to the bone.

Mr. BORYER.—I move to strike that as hearsay—that the answer be stricken and the jury instructed to disregard it.

Motion denied. Defendant allowed an exception.”

III.

The Court erred in allowing the following testimony of William Gleason, to which plaintiff in error duly excepted and exception was allowed.

Testimony was as follows:

“Mr. RITCHIE.—Q. Now, where a shot is fired in the walls of a mine, particularly an open mine or a glory hole, is there any rule about making an inspection of the surrounding walls immediately afterwards?

Mr. BORYER.—I object to the question for the reason that it is incompetent and immaterial, and for the further reason that there is no such question raised in the pleadings, and for the further reason that there is nothing in the case that would warrant the asking of such a question and that the defendant would not be bound by any answer made in response to this question.

By the COURT.—I understand there is an allegation in the complaint to the direct effect that [205] the rule of good mining required that such be done, but the question I am not so clear upon is, whose duty it is to do it, whether it is the man who is in danger himself or whether it is the duty of someone else—that is the important question.

After argument the objection as by the Court overruled, to which ruling of the Court counsel for defendant is allowed an exception.

A. Ordinarily.

Q. What is that—what is the usual course of procedure?

Mr. BORYER.—In order to avoid encumbering

the record I want the same objection to go to all similar questions.

(It is so understood and exception allowed.)

A. The rule is that a man has got to bar down his ground to make it safe, not to have loose ground in the walls after a blast—that is, if a man is going to work under it.

Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

Mr. BORYER.—We object to the question for the reason that it is immaterial and incompetent and for the further reason that it has not been shown that this work was under the direction of a shift boss or foreman.

Objection overruled. Defendant allowed an exception.

A. Why, the foreman or shift boss who is in charge.” [206]

IV.

The Court erred in overruling motion of plaintiff in error made after the defendant in error rested his case for nonsuit, which motion was as follows:

“I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the

place where he was working; that he admitted he had seen the driller bore the holes and load same and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any manner trying to ascertain the condition of the place where he was going to work. [207]

III.

For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant."

V.

The Court erred in denying the motion of plaintiff in error made at the close of the case for a directed

verdict on behalf of the defendant, which was excepted to and exception allowed, said motion being as follows:

“I.

Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was [208] working; that he admitted he had seen the driller bore the holes and load them and heard the shots fired at the place or point where his injury happened and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

II.

For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused his injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

III.

For the further reason that the plaintiff had failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the

duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

IV.

For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant.

V.

For the further reason that the defendant in its affirmative defense alleges and pleads that [209] if the plaintiff was injured, such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plaintiff himself and or by the negligence of a fellow-servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting same."

VI.

The Court erred in denying motion of plaintiff in error for judgment for defendant notwithstanding judgment for plaintiff, to which exception was taken and allowed, said motion being as follows:

"I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

- a. The jury was not justified in finding the de-

fendant guilty of negligence as alleged by the plaintiff, nor in finding against said defendant.

b. That the plaintiff alleged in his complaint that his regular occupation is that of a miner, at which employment he was able to earn and had earned and received the highest going wages as a miner; that while employed as a mucker for defendant in its mine, in a glory hole, he was struck by some earth and rock that fell from the side of a bank that had been loosened by a dynamite charge and that had not been barred down; that the recognized rules of careful and safe mining required that said walls be barred down and that [210] duty devolved upon the mine operator and his vice-principal, the foreman or shift boss directing the work.

The evidence introduced by the plaintiff shows that:

The plaintiff was an experienced miner.

That he had been working in the glory hole for two weeks; knew that the shots had been fired just prior to going to dinner. That he returned immediately after dinner and resumed work under or near the place where the shot or shots had been fired, and did so without making an examination and without taking any precautions whatever, and against the evidence introduced by him in not barring down the loose earth that he complained of, although he and the other witnesses who were called by the plaintiff testified that it was his duty to bar down the loose earth. Plaintiff claims he resumed work after dinner bulldozing rock, by reason of the orders of shift boss or foreman Green. No evidence was in-

troduced that this shift boss or foreman had been instructed or empowered to do any of the positive duties required of the defendant; no evidence was introduced connecting the earth that struck plaintiff with that loosened by the shots complained of or connected with the work.

That the verdict is against the law and evidence.”

VII.

The Court erred in denying motion of plaintiff in error for a new trial, which was excepted to and exception [211] allowed, which motion was as follows:

“I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

(a) That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

(b) That the plaintiff based his cause of action upon the following facts: That on or about February 1st, 1913, plaintiff, while employed by defendant company, was at work in glory hole of defendant's mine; that he went to dinner about 11:30 P. M. and returned to work about 12:30 A. M.; that after quitting work to go to dinner at 11:30 P. M. a shot was fired in the glory hole which further loosened some rock, gravel and earth that had been loosened prior to his going to work at 7 P. M. of that day; that when he returned from dinner about 12:30 A. M. he was ordered by the shift boss or foreman to resume immediately his work of bulldozing at the bottom of the glory hole, and while so employed some rock

and earth loosened by the shot in the afternoon and further loosened by the shot fired between the hours of 11:30 P. M. and 12:30 A. M. in a wall adjacent to where the afternoon shot had been fired, fell on him, causing the injury complained of in the complaint; that he was under the immediate orders and direction of one Green who was a shift boss or foreman and whose duty it was to have barred down the loose rock and gravel that struck and injured him.

(c) Defendant denies all of the above [212] allegations except that plaintiff was employed by defendant and sets up affirmative defense of contributory negligence, assumption of risk and fellow-servant; plaintiff filed no reply denying the above defenses.

(d) Plaintiff failed to show that any shot had been fired in the afternoon before he began work on his shift and failed to show that any earth had been loosened in the afternoon that should have been barred down, and failed to show that any earth or rock that should have been barred down or that was loosened by any shot is the earth and rock that struck the plaintiff and injured him, and failed to show that defendant had examined the place.

(e) Plaintiff failed to show the relation of the foreman or shift boss Green to the defendant company and what authority he had or what duties and obligations had been given or delegated to him, and what his duties were.

(f) Plaintiff's own evidence shows that Van Campen was superintendent and manager of said mine; that Green was only a shift boss or foreman;

that the plaintiff was an experienced miner, capable of earning the highest wages as a miner; that he knew that the shots were fired and that he resumed work without examining the walls or place where he was working; that during the first part of his shift he was bulldozing large rocks with powder in the bottom of the glory hole; that it was part of his duty along with the other workmen to bar down rock, gravel and earth loosened by [213] the firing of shots; that it was a rule of the company that before going to work it was the duty of plaintiff and other workmen to examine the place, and if any loose rock or earth was found to bar it down; that he had worked from the time of coming out of the hospital until he quit the employment of the company.

II.

That the verdict is against the evidence and the law

III.

That the amount of damage allowed is excessive and was influenced by passion or prejudice.

IV.

Errors of law occurring in the trial and exceptions made by defendant.

V.

Accident or surprise by which ordinary prudence could not have guarded against.

VI.

In denying defendant's motion for a nonsuit.

VII.

In denying defendant's motion for a directed verdict.

VIII.

For the further reason that the instruction on page 8 regarding who are fellow-servants and right of recovery is erroneous and not the law determining who are fellow-servants. [214]

IX.

For the further reason that the instruction given on page 9 is erroneous and not correct law regarding servant's authority.

X.

For the further reason that the instruction given on page 10 is contrary to law in that it instructs that in order for employees to be fellow-servants they must all be of the same rank of employees and one in authority over the plaintiff could not be a fellow-servant.

XI.

For the further reason that the instruction given on page 11 is erroneous in that it requires the master to furnish a safe place to work.

XII.

For the further reason that the instruction given on page 12 is confusing and incomplete, in that it fails to instruct or tell the jury what certain impersonal duties are nondelegable.

XIII.

For the further reason that the instruction given on page 13 is contrary to law.

XIV.

For the further reason that the instruction given regarding damages instructs so that the jury might base damages on plaintiff's expectancy or probable

length of life when no evidence was introduced as to plaintiff's expectancy or probable length of life.

XV.

For the further reason that the instruction requiring the defendant to prove by the preponderance of evidence its affirmative defense when no reply had [215] been filed or served denying them is erroneous and contrary to law, and instructed the jury that it was the duty of the defendant to prove that the plaintiff was a fellow-servant with the one who caused his injury."

VIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

Fellow-servant:

The Court instructs the jury that in order to constitute servants of the same master fellow-servants, it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution."

IX.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

You are further instructed that if you believe from a preponderance of evidence that the defend-

ant was guilty of negligence, as alleged in the plaintiff's complaint, and the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury."

X.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed: [216]

"Instruction:

Vice-principal:

You are instructed that when an injury results to a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in performance of a duty, the breach of which by the master in person would create a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority, the master is responsible in damages to the injured servant if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if he is clothed with apparent authority to direct and command, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for in-

juries resulting from his imprudent conduct or negligent act."

XI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman not in authority over him. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant, but what is known in law as a vice-principal. [217] Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work cannot be shifted by the master and the agent representing the master in the premises must perform that duty, and if he fails through negligence, the negligence is that of the master."

XII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers of his employment. That is, the dangers necessarily at-

tendant upon the employment and hazard of accidents which may occur in course of its employment after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have [218] happened or the injury resulted but for the conditions arising from the employer's negligence."

XIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master, and he cannot delegate them to a servant and then escape liability, if the servant fails to perform or negligently performs the duty, on the ground

that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master the one to whom he entrusts the performance of this duty is called a vice-principal, and the master is liable for his negligence in relation to such duties."

XIV.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the belief that the master will not allow needlessly unsafe conditions to exist." [219]

XV.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of the plaintiff's complaint were true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then

consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by the plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit, that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable to do so."

XVI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and must prove the [220] same by a preponderance of the evidence. And in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all the affirmative allegations set up in its answer.

The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at

issue, you should determine that question or issue against the one having the affirmative of that particular question or issue.”

XVII.

The Court erred in refusing to give instruction No. 2 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 2:

You are instructed that the plaintiff bases his cause of action upon the defendant's negligence in that the plaintiff claims that the defendant negligently, recklessly and wantonly failed and neglected to make sufficient examination of the wall in the glory hole where the plaintiff was working after shots had been fired in said glory hole and to bar down all loose rock and earth adhering to said wall, or to remove from the wall all loose portions unsettled by the shots mentioned in the complaint. You are instructed that before the plaintiff can recover in this action it will be necessary for him to prove by the preponderance of the evidence that the defendant did not make sufficient examination of the wall complained of in the complaint, from which the rock and earth had been detached, and prove that at or before the time he entered [221] this place to perform his work that there was loose rock and earth adhering to the wall, and must further prove that the defendant failed to remove from the wall all loose portions unsettled by the shots mentioned in the complaint and still adhering to the wall, and unless the plaintiff establishes these facts by the preponderance of the evidence, you are instructed he

cannot recover in this action.”

XVIII.

The Court erred in refusing to give instruction No. 3 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 3:

You are instructed that before the plaintiff can recover in this action he must show that he exercised ordinary and reasonable care, that is, such care as an ordinary, prudent person would exercise under the same circumstances, the degree of care which must be taken by the plaintiff must be adjusted to the character of the work and it should be commensurate with the dangers of the employment.”

XIX.

The Court erred in refusing to give instruction No. 4 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 4:

You are instructed that if you find from the evidence there was a rule in existence at the defendant's mine requiring all workmen to examine the place or places where they were working to see that such places were safe to work in and about, you are then instructed that the law presumes this rule was known to the plaintiff at the time he was injured and when he entered the place where he was injured.”

[222]

XX.

The Court erred in refusing to give Instruction

No. 5 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 5:

You are instructed that if it was the duty of the plaintiff to make safe or assist in making safe the place where he was working as the work progressed, then the plaintiff cannot recover in this action.”

XXI.

The Court erred in refusing to give Instruction No. 6, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 6:

You are instructed that if it was the duty of the plaintiff to assist and help to bar down the loose earth, gravel and rock that caused his injury and he failed to do so, the plaintiff cannot recover in this action.”

XXII.

The Court erred in refusing to give Instruction No. 8, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 8:

You are instructed that the plaintiff alleges in his complaint that he was a miner and capable of earning the highest going wages paid to miners when opportunity offered, therefore he cannot recover for his injuries if same were caused by his inattention to his surroundings and failure to take due precautions against known or obvious dangers.” [223]

XXIII.

The Court erred in refusing to give Instruction No. 9 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 9:

You are instructed that if it was the duty of the plaintiff in this action to inspect the place where he was working to see if it was safe to work at the place or point where he was working, and he failed to make this inspection, you are instructed he cannot recover in this action.”

XXIV.

The Court erred in refusing to give Instruction No. 10 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 10:

You are instructed that if the plaintiff knew, or if the dangers connected with the work were so patent and obvious that he either knew, or in the exercise of ordinary care should have known of their existence, he assumes the risk of injury from the dangers and defects of which he complains in his complaint.”

XXV.

The Court erred in refusing to give Instruction No. 13 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 13:

You are instructed that if the plaintiff had actual or constructive knowledge of the dangers or unsafe

condition of the place and he failed to take such precautions as a reasonably prudent man under similar circumstances would exercise to avoid the dangers, and is injured by reason of his failure to use such ordinary [224] care, he is guilty of contributory negligence and cannot recover in this action."

XXVI.

The Court erred in refusing to give Instruction No. 16 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 16:

You are instructed that all persons who serve the same master, work under the same control, deriving authority and compensation from the same source and are engaged in the same general business, although it may be in different grades or departments of it, are fellow-servants."

XXVII.

The Court erred in refusing to give Instruction No. 17 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 17:

You are instructed that if the defendant by any of its agents, or servants, carefully examined the glory hole after the shots alleged in the complaint were fired and the person or persons making this examination thought or pronounced it safe, and such person or persons were coworkers and fellow-servants of the plaintiff, you are instructed the plaintiff

cannot recover in this action.”

XXVIII.

The Court erred in refusing to give Instruction No. 18 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 18:

You are instructed that the plaintiff alleges in his complaint that “he is a miner by occupation, at which [225] employment he was able to earn when opportunity offered, and had earned and received, the highest wages as a miner.” This allegation you must consider as true as there has been no evidence offered by the defendant to contradict this allegation. Therefore, if you find from the evidence that the plaintiff prior to receiving the injuries complained of, had knowledge, or from his experience and knowledge imputed to him as a miner, had knowledge of facts such as would lead a man of his experience and knowledge to believe that there was danger of injury from falling rocks and earth at the place where the injury occurred, and with such knowledge he continued to work without notifying the proper officers of the defendant company of such danger and while continuing to work at this place received the injury complained of, then, in that case, you are instructed the plaintiff cannot recover in this action.”

XXIX.

The Court erred in refusing to give Instruction No. 20 requested by appellant, to which exception

was taken and allowed. Said instruction was as follows:

“Instruction No. 20:

You are instructed that before you can find that shift boss or foreman Green was a vice-principal and that it was his duty as such foreman to provide a reasonably safe place for the men under his direction to work and to see and provide after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning be detached, it is necessary that you first find from the evidence introduced by the plaintiff that the defendant corporation entrusted this duty upon this foreman, and unless you find from the evidence that the defendant corporation did delegate to shift [226] boss or foreman Green the duty of providing the place for work for the plaintiff, and require of him to provide that after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the wall, you are instructed the plaintiff cannot recover in this action by reason of any negligence of shift boss or foreman Green.”

XXX.

The Court erred in refusing to give Instruction No. 21 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 21:

You are instructed that if you find from the evidence that it was the duty of the plaintiff and his fellow-workmen to make safe the place of work as

it progressed and to bar down all loosened rock and earth after shots had been fired, the master's or defendant's duty is fulfilled when he furnishes them with suitable material and implements for doing this work, and if the plaintiff or any of his fellow-servants failed or neglected to make the place safe, or failed to bar down the loose earth and gravel which caused the plaintiff's injury, he cannot recover in this action."

XXXI.

The Court erred in refusing to give Instruction No. 22 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 22:

You are instructed that the plaintiff in this case has introduced in evidence that by the rules of the defendant company it was the duty of the plaintiff along with the other men working with him to assist in and bar down the loose rock, earth and gravel left after the shots had been fired, the plaintiff having introduced this in evidence he is [227] bound by it where there is no evidence to the contrary, therefore, you are instructed if this rule made it the duty of the plaintiff to assist in and bar down the loose rock, earth and gravel that fell and injured him and he failed, neglected or refused to do so and was injured by reason of said earth, rock and gravel falling down and striking him, you are instructed he cannot recover in this case."

XXXII.

The Court erred in refusing to give Instruction

No. 23 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 23:

You are instructed that the plaintiff failed to introduce in evidence what, if any, power or authority the shift boss or foreman Green had, or what authority or power or what duties the defendant company had entrusted to him or that he had authority or right to give any order or command which violated any rule of the company or prevented any rule of the company being carried out or that he had authority, or it was his duty to see or do anything regarding the safety of the place where the men were working; therefore, you are instructed that if the rules of the defendant company required the plaintiff, along with the other men working with him, to assist in and bar down the loose earth, rock and gravel left after the shots had been fired, you are instructed that it was the duty of the plaintiff to assist in and bar down the loose earth, rock and gravel, that afterwards fell and struck him causing the injury, and this is true although the shift boss or foreman Green instructed him to start bulldozing, and if he failed or neglected to bar down the loose rock earth and gravel that struck him, he cannot [228] recover in this action.”

XXXIII.

The Court erred in refusing to give Instruction No. 24 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 33:

You are instructed that the plaintiff has failed to introduce or show in evidence that the shift boss or foreman Green advised or told the plaintiff that he need not bar down the loose rock and earth that the plaintiff claims struck him or that anyone else told him this or informed him that the shift boss or foreman Green had said not to bar down the loose rock and gravel that struck the plaintiff; therefore you are instructed that if the rule of the company required that he do or assist in barring down this earth, you are instructed that it was the duty of the plaintiff to do so although the foreman had advised him to begin bulldozing, and if he failed to bar down said earth, rock and gravel and was injured by reason of said earth, rock and gravel not being barred down, you are instructed he cannot recover in this action.”

XXXIV.

The Court erred in refusing to give Instruction No. 25 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 25:

You are instructed that no evidence was introduced showing that the earth which struck the plaintiff causing the injury was earth or rock that had been loosened by the shots that had been fired at the time alleged in the complaint to have been fired or that the earth and rock which struck the plaintiff was earth and rock [229] that should have been barred down or looked after by the defendant, and

before you can find for the plaintiff in this case it is necessary that he prove that the earth and rock which struck him was earth and rock that had been loosened by the shots complained of in the complaint and that should have been barred down, and unless you so find from the evidence introduced in this case, you are instructed the plaintiff cannot recover.”

WHEREFORE, the defendant, plaintiff in error, prays that said judgment may be rendered, vacated and set aside, and that the verdict found by the jury on which said judgment was based may be vacated and set aside, and for such other and further relief or both in the premises as may be proper.

R. J. BORYER,

Attorney for The Beatson Copper Company.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [230]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpora-
tion,

Defendant.

**Order Allowing, Settling and Certifying Bill of Ex-
ceptions.**

It appearing to the Court that the defendant has

prepared and duly served upon the attorney for the plaintiff herein, within due time, a proposed Bill of Exceptions, and the Judge of said court having duly designated the 17th day of December, 1913, as the time at which he would settle the Bill of Exceptions, and both parties having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 17th day of December, 1913, and attorneys for both parties having been present:

It was thereupon, and is hereby, ordered that the proposed Bill of Exceptions be allowed, the same shall be and is hereby settled and allowed as a Bill of Exceptions herein and presented to the Judge of this court for his certificate. [231]

And it further appearing to the Court that said proposed Bill of Exceptions conforms to the truth and is in proper form, it is therefore ordered that the said bill is a true Bill of Exceptions, and the same is hereby approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17th day of December, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 62. [232]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpora-
tion,

Defendant.

Order Allowing Writ of Error.

On this day came the defendant, the Beatson Copper Company, a corporation, by its attorney, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and an assignment of errors to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that the amount of bond for supersedeas in said cause be fixed. On consideration whereof, the Court does hereby allow a Writ of Error as prayed for.

Dated this 17th day of December, A. D. 1913.

FRED M. BROWN,

Judge of the District Court for the Territory and
District of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 63. [233]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Writ of Error [Original].

The President of the United States of America, to the Honorable Judge of the District Court for the Territory and District of Alaska, Third Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict, which is in the said District Court before you, or some of you, between John Pedrin, the original plaintiff and the defendant in error, and the Beatson Copper Company, the original defendant and the plaintiff in error, manifest error hath happened to the damage of the said Beatson Copper Company, plaintiff in error, as by its answer appears we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States [234] Circuit Court

of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said circuit, on the 16th day of January, A. D. 1914, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of December, in the year of our Lord one thousand nine hundred and thirteen.

ARTHUR LANG,

Clerk.

By T. P. Geraghty,

Deputy Clerk of the District Court for the Territory and District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,

Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Writ of Error received and service of original acknowledged this the 17th day of December A. D. 1913.

E. E. RITCHIE,

Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [235]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Writ of Error [Copy].

The President of the United States of America, to
the Honorable Judge of the District Court for
the Territory and District of Alaska, Third Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict, which
is in the said District Court before you, or some of
you, between John Pedrin, the original plaintiff
and the defendant in error, and the Beatson Copper
Company, the original defendant and the plaintiff in
error, manifest error hath happened to the damage
of the said Beatson Copper Company, plaintiff in
error, as by its answer appears, we being willing
that error, if any hath been, should be duly corrected
and full and speedy justice done to the parties
aforesaid in this behalf, do command you, if judgment
be therein given, that then, under your seal,
distinctly and openly, you send the record and proceedings
aforesaid with all things concerning the
same, to the United States [236] Circuit Court
of Appeals for the Ninth Judicial Circuit, together

with this writ, so that you have the same in San Francisco, in said circuit, on the 16th day of January, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of December, in the year of our Lord one thousand nine hundred and thirteen.

ARTHUR LANG,
Clerk.

By T. P. Geraghty,
Deputy Clerk of the District Court for the Territory
and District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,
Presiding Judge in the District Court for the Terri-
tory and District of Alaska, Third Division.

Copy of this Writ of Error received and service
of original acknowledged this the 17 day of De-
cember. A. D. 1913.

E. E. RITCHIE,
Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska,
Third Division. Dec. 17, 1913. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [237]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Bond on Writ of Error [Original.]

KNOW ALL MEN BY THESE PRESENTS, That the Beatson Copper Company, defendant in the above-entitled action as principal, and American Surety Co., of New York, N. Y., duly authorized to do business in Alaska and to sign bonds, as surety, are held and firmly bound unto John Pedrin, plaintiff and defendant in error in the above-entitled cause in the penal sum of Five Thousand Dollars (\$5,000.00), lawful money of the United States of America, to be paid to the said John Pedrin, his successors or assigns, his executors and administrators, for which payment, well and truly to be made, we bind ourselves and each of us, and severally, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this the 17th day of December, A. D. 1913.

The condition of the foregoing obligation is such that,

WHEREAS, the said Beatson Copper Company, a

corporation, [238] defendant in said cause, as above-named principal obligator, is suing out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause entered November 14th, 1913, by the District Court of the United States for the District Court for the District and Territory of Alaska, Third Division, in favor of said plaintiff and against said defendant for the sum of Four Thousand Dollars (\$4,000.00) and costs, and

WHEREAS the said principal obligator desires to give good and sufficient security in accordance with the statute in such cases made and provided for, all costs and damages to be occasioned by said Writ of Error and to operate as a supersedeas upon such judgment and stay the execution thereof pending the hearing and decision of said Circuit Court of Appeals upon said Writ of Error,

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal obligator, defendant in said cause, shall prosecute said Writ of Error to effect, and if it fails to make good its plea, shall answer all damages, interest and costs, then this obligation shall be void; otherwise to remain in full force and effect.

AMERICAN SURETY CO.,

By A. J. SIGSBY,

Agent.

THE BEATSON COPPER COMPANY, a
Corporation.

By R. J. BORYER,

Atty. for the Beatson Copper Co., Inc.

Approved 17th day of December 1913.

FRED M. BROWN,
Judge, Third Division Territory of Alaska. [239]

Filed in the District Court, Territory of Alaska,
Third Division. Dec. 17, 1913. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Citation [on Writ of Error (Copy)].

United States of America.

The President of the United States to John Pedrin,
Greeting:

You are cited and admonished to be and appear in
the United States Circuit Court of Appeals for the
Ninth Circuit at the courtroom of said court, in the
city of San Francisco, in the State of California,
within thirty days after the date of this citation,
pursuant to writ of error filed in the Clerk's office
of the District Court for the Territory of Alaska,
Third Division, wherein the Beatson Copper Com-
pany is plaintiff in error, and you are the defendant
in error, to show cause, if any there be, why the

judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United [240] States, the 17 day of December, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,

Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Citation received and service of original acknowledged this the 17th day of December A. D. 1913.

E. E. RITCHIE,

Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 63. [241]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corporation,

Defendant.

Citation [on Writ of Error (Copy).]

United States of America.

The President of the United States to John Pedrin,
Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Beatson Copper Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United [242] States, the 17 day of December, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,
Judge in the District Court for the Territory and
District of Alaska, Third Division.

Copy of this Citation received and service of original acknowledged this the 17th day of December, A. D. 1913.

E. E. RITCHIE,
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 63. [243]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

**Acknowledgment of Service of Papers on Writ of
Error.**

Service of the Petition for Writ of Error, Order Allowing Writ of Error, of the Assignment of Errors, of the Bond on Writ of Error, of the Citation on Writ of Error, and of Writ of Error in the above-entitled cause, filed in the above-entitled court, on the 17 day of December A. D. 1913, is hereby acknowledged, and receipt of true copies thereof on this 17th day of December A. D. 1913, is also acknowledged.

E. E. RITCHIE,

Attorney for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [244]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

VS.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true Bill of Exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17 day of December,
A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 17, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 64. [245]

*In the District Court for the Territory of Alaska,
Third Division.*

Certificate of Clerk U. S. District Court to Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 250 pages, numbered from 1 to 250, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office;

That this transcript is made in accordance with the defendant's and appellant's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and that the cost thereof, amounting to \$110.70, was paid to me by R. J. Boryer, attorney for defendant and appellant herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 18th day of December, A. D. 1913.

[Seal]

ARTHUR LANG,
Clerk. [246]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 633.

JOHN PEDRIN,

Plaintiff,

vs.

THE BEATSON COPPER COMPANY, a Corpo-
ration,

Defendant.

Amended Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forth-
with to the United States Circuit Court of Appeals
for the Ninth Judicial Circuit, at San Francisco, a
copy of the record in the above-entitled cause as a
return to the Writ of Error *herebefore* sued out of
said Circuit Court of Appeals to review the judg-
ment in said cause, consisting of the following files
and records and proceedings in said cause:

Complaint.

Answer.

Motion for Nonsuit.

Minute Order Denying Motion for Nonsuit, Excep-
tion Taken and Allowed.

Motion for Directed Verdict.

Minute Order Denying Same and Exception Taken
and Allowed.

Defendant's Requested Instructions.

Verdict.

Judgment.

Defendant's Exceptions to Court's Instructions to Jury.

Motion for Judgment for Defendant Notwithstanding Judgment for Plaintiff.

Order Overruling Same.

Motion for New Trial.

Order Overruling Same.

Stipulation and Order Extending Time to Settle Bill of Exceptions, With Certificate. [247]

Order Settling and Allowing Bill of Exceptions.

Certificate of Judge to Bill of Exceptions.

Petition for Writ of Error.

Order Allowing Writ of Error.

Assignment of Errors.

Bond for Costs and Supersedeas on Writ of Error.

Writ of Error and Copy.

Citation and Copy of Citation.

Acceptance of Service of Papers on Writ of Error.

This Praecipe.

R. J. BORYER,
Attorney for Defendant.

Filed in the District Court, Territory of Alaska,
Third Division. Dec. 18, 1913. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [248]

[Endorsed]: No. 2360. United States Circuit Court of Appeals for the Ninth Circuit. The Beatson Copper Company, a Corporation, Plaintiff in Error, vs. John Pedrin, Defendant in Error. Transcript of Record. Upon Writ of Error to the United

States District Court of the Territory of Alaska,
Third Division.

Received and filed December 27, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2360.

IN THE
UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE BEATSON COPPER COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN PEDRIN,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

R. J. BORYER,
MYRICK & DEERING,
Attorneys for Plaintiff in Error.

Filed this.....day of March, A. D. 1914.

....., Clerk.

By....., Deputy Clerk.

FILED

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE BEATSON COPPER COM- PANY, a corporation, vs. JOHN PEDRIN,	<i>Plaintiff in Error,</i> <i>Defendant in Error.</i>	} No. 2360

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action for personal injuries in which the plaintiff below, defendant in error herein, recovered a verdict in the sum of \$4000.00. Motions for a nonsuit at the close of plaintiff's case, and for a directed verdict at the close of all the evidence, and for judgment for defendant notwithstanding the verdict, and for a new trial, were all denied, and judgment entered in favor of the defendant in error on the verdict. This appeal is taken from the final judgment, and from the

various orders above mentioned. The errors assigned include the making of above orders and various rulings on evidence and instructions.

John Pedrin, who was plaintiff in the court below, and will be designated in this brief as plaintiff, was an experienced miner when, on November 12th, 1912, he began to work for The Beatson Copper Company, plaintiff in error herein, and defendant below. Said Company owned a mine in which there was a large pit, at one end of which was a smaller and deeper pit called a glory hole. This glory hole, which was originally a small but deep excavation near one end of the large pit, was in November and December, 1912, and January, 1913, being enlarged by the work of Pedrin and his fellow servants; who, by drilling and blasting the sides of said glory hole caused the surrounding ore-bearing rock to be thrown therein, and did there break up the large pieces of ore, and carry them thence to the chute where they were sent to the mill. The method of operation seems to have been to drill a hole in the side wall of this glory hole, place a charge of dynamite therein, explode it, then pry down from the broken sides into the glory hole such fragments of dirt or rock as were left by the explosion of the dynamite charge, descend into the hole and carry thence the debris to a point where it could be crushed, and the valuable metals extracted therefrom. When the fragments falling from the side walls were too large to be handled conveniently, they

were bulldozed, that is, smaller charges of dynamite were exploded, causing the rock to break up into fragments suitable for handling. Often the overhanging walls of the glory hole were shattered by the dynamite charge, and were left in an unsafe condition by reason of the fact that pieces, which were loosened but not dislodged, were likely at any time to fall upon the men below, who were bulldozing and mucking, that is, collecting and carrying away the ore at the bottom of the glory hole. It was the duty of plaintiff Pedrin, his shift-boss and Schmitt, to pry away this loose and overhanging rock before they went down into the pit to do their work of bulldozing and mucking. The glory hole was about 15 feet wide by 20 feet long, and had a depth of 10 to 12 feet at the time of the accident referred to in this record. One evening, in the latter part of January, 1913, Pedrin, Schmitt and Green, the shift-boss, together with a couple of drillers, were working enlarging this glory hole and taking away therefrom the rock. The shift went to work about 7 o'clock in the evening. Schmitt and Pedrin were working in the glory hole, and the two drillers were drilling on the sides of the glory hole, so as to place their charges of dynamite. They worked in this manner until 11:20 at night, when they all went for dinner. At that time the drillers had one or more charges ready to explode, and as the plaintiff and Schmidt were at their dinner in the eating-house they heard the charges explode. All of the men on

this shift ceased work from 11:20 to about 12 o'clock midnight. On going to dinner the plaintiff noticed that the load of powder or dynamite was ready to fire, and while seated at his dinner he heard the shot; on returning to the glory hole at midnight Schmitt started to bar down the loosened rock from the sides of the glory hole so as to avoid any mishap while he and Pedrin, the plaintiff, were working below. It is not apparent that Pedrin made any examination of the side walls of the glory hole, but some inspection was made by Schmitt, who discovered an unsafe condition. Green, the shift-boss, told Schmitt to go down into the glory hole, as he was in a hurry to get some ore, and he told Pedrin to go down into the hole and bulldoze the rocks that had fallen down (Record, p. 105). Schmitt says that when he picked up the bar to pry down the rock, Green told him to leave it alone, and ordered him to get some powder to bulldoze the rock. Schmitt refused to get the powder, and Pedrin, the plaintiff, went for it (Record, pp. 28, 105). They then lowered themselves into the hole and were busy bulldozing when Schmitt noticed the overhanging rocks on the side wall begin to cave. He called to Pedrin to get out of the way, but before Pedrin could move the rocks caved upon him, hit him upon the back, causing the injuries complained of in the pleading (Record, pp. 112, 113).

Pedrin and the others testified that it was the custom to bar down the loose stuff from the side walls, and if

necessary get powder and explode the same in the cracks so as to dislodge all of the loose material and make the place entirely safe before they proceeded with the work below. This was not done at the time in question by reason of the directions of the shift-boss. There are some collateral facts apparent from the testimony that bear upon the points presented upon this appeal. Pedrin had worked on the night shift in this place for two weeks or more; he had worked about the pit and mine for about two months. Green, the shift-boss, was not a superintendent, but his duties were to work with the plaintiff and Schmitt, and the drillers, and he seemed to be a superior servant in that they carried out his directions. Further than that his authority is not disclosed by the record (Record, p. 116).

The plaintiff states in his complaint, in paragraph 3, that shortly before beginning work at 7 o'clock on the night shift, a powder charge had been fired in one side of the glory hole to bring down the ore and rock and after *this* shot had been fired, defendant failed to make an examination of the wall at the place where this shot had been fired and to bar down the loosened earth. That while the plaintiff, between 11:30 and 12:30 of that night was off duty, at dinner, *another* shot was fired in the wall at a place adjacent to the shot discharged in the afternoon. That the shot fired while he was at dinner further loosened the ore and rock that had been shot during the afternoon;

and after the plaintiff returned to work at 12:30 a. m., several tons of rock and earth that had been shot in the *afternoon* and that had not been barred down, struck the plaintiff, causing him the injuries complained of in the complaint.

Paragraph 4 alleges that one Green was shift boss, or foreman, and vice-principal of defendant company, and that it was the duty of Green to provide a reasonably safe place to work, and that it was Green's negligence in failing to see that this rock had been barred down and other precautions taken, that caused the injury.

The evidence fails to show in what capacity Green was employed, and what authority this shift-boss Green had in connection with this work. It fails to show that Green had been entrusted with any of the positive duties of the defendant (Record, p. 116), but does show that F. R. Van Campen was superintendent and manager of the mine and in charge of the work (Record, p. 22, 109).

The only evidence introduced as to what earth and rock struck the plaintiff was testified to by John Schmitt. In his testimony he admits it was the earth and rock from the shot that was fired while they were at dinner that struck and injured the plaintiff and not the earth and rock complained of in the complaint as having been shot and loosened during the afternoon before plaintiff began work on the night shift. That the shot that loosened the earth which struck plaintiff

was drilled, loaded and sprung in plain view of the plaintiff between 7 o'clock in the evening and 11:30 o'clock, that the plaintiff knew this and several times had to leave his work while they were springing the hole. Schmitt also admits that Green was merely a shift boss on the work (Record, p. 109).

SPECIFICATION OF ERRORS.

We desire to specify the following errors, which are relied upon, each of which is asserted in this brief, and intended to be urged.

I.

The Court erred in allowing the following testimony of William Gleason, to which plaintiff in error duly excepted and exception was allowed.

Testimony was as follows:

"MR. RITCHIE—Q. Now, where a shot is fired in the walls of a mine, particularly an open mine or a glory hole, is there any rule about making an inspection of the surrounding walls immediately afterwards?

"MR. BORYER—I object to the question for the reason that it is incompetent and immaterial, and for the further reason that there is no such question raised in the pleadings, and for the further reason that there is nothing in the case that would warrant the asking of such a question and that the defendant would not be bound by any answer made in response to this question.

"BY THE COURT—I understand there is an

allegation in the complaint to the direct effect that the rule of good mining required that such be done, but the question I am not so clear upon is, whose duty it is to do it, whether it is the man who is in danger himself, or whether it is the duty of someone else—that is the important question.

“After argument the objection was by the Court overruled, to which ruling of the Court counsel for defendant is allowed an exception.

“A. Ordinarily.

“Q. What is that—what is the usual course of procedure?

“MR. BORYER—In order to avoid encumbering the record, I want the same objection to go to all similar questions.

“(It is so understood and exception allowed.)

“A. The rule is that a man has got to bar down his ground to make it safe, not to have loose ground in the walls after a blast—that is, if a man is going to work under it.

“Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

“MR. BORYER—We object to the question for the reason that it is immaterial and incompetent, and for the further reason that it has not been shown that this work was under the direction of shift boss or foreman.

“Objection overruled. Defendant allowed an exception.

“A. Why, the foreman or shift boss who is in charge” (Record, pages 192 to 193, Assignment of Error No. 3).

II.

The Court erred in overruling motion of plaintiff in error made after the defendant in error rested his case for nonsuit, which motion was as follows:

“I.

“Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining; that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning work for the defendant company, and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load same, and heard the shots fired at the place or point where his injury happened, and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

“2.

“For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused the injury, proceeded to work without either examining or in any manner trying to ascertain the condition of the place where he was going to work.

"3.

"For the further reason that the plaintiff has failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff, and was a fellow-servant.

"4.

"For the further reason that the plaintiff has failed to show that the defendant company was negligent in any manner and has failed to establish and make out a case against this defendant" (Record, pages 193 to 194, Assignment of Error No. 4).

III.

The Court erred in denying the motion of plaintiff in error made at the close of the case for a directed verdict on behalf of the defendant, which was excepted to and exception allowed, said motion being as follows:

"I.

"Because the plaintiff alleges in his complaint that he is an experienced miner, capable of earning the highest wages for mining, that his evidence shows that he has followed mining for several years; that he had worked in and around the place where he was injured ever since beginning

work for the defendant company and had been working in the pit or hole where the accident occurred for about two weeks and knew the conditions surrounding the place where he was working; that he admitted he had seen the driller bore the holes and load them and heard the shots fired at the place or point where his injury happened and which shot or shots the plaintiff claims in his complaint was the cause of the earth falling and injuring the plaintiff.

“2.

“For the further reason that the plaintiff himself, although being an experienced miner and knowing that the shots complained of in his complaint had been fired at the place mentioned in his complaint, which caused his injury, proceeded to work without either examining or in any other manner trying to ascertain the condition of the place where he was going to work.

“3.

“For the further reason that the plaintiff had failed to show or establish what relation, if any, the foreman or shift boss bore to the defendant, and the duties, responsibility and authority of said foreman or shift boss in connection with the defendant company, while the evidence does show that said foreman or shift boss was engaged in a common employment along with the plaintiff and was a fellow-servant.

“4.

“For the further reason that the plaintiff has failed to show that the defendant company was

negligent in any manner and has failed to establish and make out a case against this defendant.

“5.

“For the further reason that the defendant in its affirmative defense alleges and pleads that if the plaintiff was injured such injuries arose from and grew out of the risks incident to his employment and which the plaintiff assumed, also pleading as an affirmative defense that if said plaintiff was injured, such injuries were due to the negligence of the plaintiff himself and or by the negligence of a fellow-servant; that the plaintiff has failed, neglected and refused to deny or otherwise plead to said affirmative defenses, thereby admitting the same” (Record on pages 194 to 196, assignment of error No. 5).

IV.

The Court erred in denying motion of plaintiff in error for judgment for defendant notwithstanding judgment for plaintiff, to which exception was taken and allowed, said motion being as follows:

“I.

“Insufficiency of evidence to sustain or justify the verdict in the following particulars:

“a. The jury was not justified in finding the defendant guilty of negligence as alleged by the plaintiff, nor in finding against said defendant.

“b. That the plaintiff alleged in his complaint that his regular occupation is that of a miner, at which employment he was able to earn and had earned and received the highest going wages as a miner; that while employed as a mucker for de-

fendant in its mine, in a glory hole, he was struck by some earth and rock that fell from the side of a bank that had been loosened by a dynamite charge and that had not been barred down; that the recognized rules of careful and safe mining required that said walls be barred down and that duty devolved upon the mine operator and his vice-principal, the foreman or shift boss directing the work.

"The evidence introduced by the plaintiff shows that:

"The plaintiff was an experienced miner.

"That he had been working in the glory hole for two weeks; knew that the shots had been fired just prior to going to dinner. That he returned immediately after dinner and resumed work under or near the place where the shot or shots had been fired, and did so without making an examination and without taking any precautions whatever, and against the evidence introduced by him in not barring down the loose earth that he complained of, although he and the other witnesses who were called by the plaintiff testified that it was his duty to bar down the loose earth. Plaintiff claims he resumed work after dinner bulldozing rock, by reason of the orders of shift boss or foreman Green. No evidence was introduced that this shift boss or foreman had been instructed or empowered to do any of the positive duties required of the defendant; no evidence was introduced connecting the earth that struck plaintiff with that loosened by the shots complained of or connected with the work.

"That the verdict is against the law and evidence" (Record on page 196 to 198, assignment of error No. 6).

V.

The Court erred in denying motion of plaintiff in error for a new trial, which was excepted to and exception allowed, which motion was as follows:

“I.

“Insufficiency of evidence to sustain or justify the verdict in the following particulars:

“(a) That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

“(b) That the plaintiff based his cause of action upon the following facts: That on or about February 1st, 1913, plaintiff, while employed by defendant company, was at work in glory hole of defendant's mine; that he went to dinner about 11:30 P. M. and returned to work about 12:30 A. M.; that after quitting work to go to dinner at 11:30 P. M. a shot was fired in the glory hole which further loosened some rock, gravel and earth that had been loosened prior to his going to work at 7 P. M. of that day; that when he returned from dinner about 12:30 A. M. he was ordered by the shift boss or foreman to resume immediately his work of bulldozing at the bottom of the glory hole, and while so employed some rock and earth loosened by the shot in the afternoon and further loosened by the shot fired between the hours of 11:30 P. M. and 12:30 A. M. in a wall adjacent to where the afternoon shot had been fired, fell on him, causing the injury complained of in the complaint; that he was under the immediate orders and direction of one Green who was a shift boss or foreman and whose duty it was to have barred down the loose rock and gravel that struck and injured him.

“(c) Defendant denies all of the above allegations except that plaintiff was employed by defendant and sets up affirmative defense of contributory negligence, assumption of risk and fellow-servant; plaintiff filed no reply denying the above defenses.

“(d) Plaintiff failed to show that any shot had been fired in the afternoon before he began work on his shift and failed to show that any earth had been loosened in the afternoon that should have been barred down, and failed to show that any earth or rock that should have been barred down or that was loosened by any shot is the earth and rock that struck the plaintiff and injured him, and failed to show that defendant had examined the place.

“(e) Plaintiff failed to show the relation of the foreman or shift boss Green to the defendant company and what authority he had or what duties and obligations had been given or delegated to him, and what his duties were.

“(f) Plaintiff's own evidence shows that Van Campen was superintendent and manager of said mine; that Green was only a shift boss or foreman; that the plaintiff was an experienced miner, capable of earning the highest wages as a miner; that he knew that the shots were fired and that he resumed work without examining the walls or place where he was working; that during the first part of his shift he was bulldozing large rocks with powder in the bottom of the glory hole; that it was part of his duty along with the other workmen to bar down rock, gravel and earth loosened by the firing of shots; that it was a rule of the company that before going to work it was the duty of plaintiff and other workmen to examine the place, and if any loose rock or earth was found to bar it down; that he had worked from the time of coming out of the hospital until he quit the employment of the company.

"II.

"That the verdict is against the evidence and the law.

"III.

"That the amount of damage allowed is excessive and was influenced by passion or prejudice.

"IV.

"Errors of law occurring in the trial ad exceptions made by defendant.

"V.

"Accident or surprise by which ordinary prudence could not have guarded against.

"VI.

"In denying defendant's motion for a nonsuit.

"VII.

"In denying defendant's motion for a directed verdict.

"VIII.

"For the further reason that the instruction on page 8 regarding who are fellow-servants and right of recovery is erroneous and not the law determining who are fellow-servants.

"IX.

"For the further reason that the instruction given on page 9 is erroneous and not correct law regarding servant's authority.

"X.

"For the further reason that the instruction given on page 10 is contrary to law in that it instructs that in order for employees to be fellow-servants they must all be of the same rank of employees and one in authority over the plaintiff could not be a fellow-servant.

"XI.

"For the further reason that the instruction given on page 11 is erroneous in that it requires the master to furnish a safe place to work.

"XII.

"For the further reason that the instruction given on page 12 is confusing and incomplete, in that it fails to instruct or tell the jury what certain impersonal duties are nondelegable.

"XIII.

"For the further reason that the instruction given on page 13 is contrary to law.

"XIV.

"For the further reason that the instruction given regarding damages instructs so that the jury might base damages on plaintiff's expectancy or probable

length of life when no evidence was introduced as to plaintiff's expectancy or probable length of life.

"XV.

"For the further reason that the instruction requiring the defendant to prove by the preponderance of evidence its affirmative defense when no reply had been filed or served denying them is erroneous and contrary to law, and instructed the jury that it was the duty of the defendant to prove that the plaintiff was a fellow-servant with the one who caused his injury" (Record, pages 198-202, assignment of error No. 7).

VI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"Fellow-servant:

"The Court instructs the jury that in order to constitute servants of the same master fellow-servants, it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution" (Record, page 202, Assignment of Error No. 8).

VII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

“Instruction:

“You are further instructed that if you believe from a preponderance of evidence that the defendant was guilty of negligence, as alleged in the plaintiff’s complaint, and the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe from the evidence that the negligence of a fellow-servant contributed to such injury” (Record, pages 202-3, Assignment of Error No. 9).

VIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

“Instruction:

“Vice-principal:

“You are instructed that when an injury results to a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in performance of a duty, the breach of which by the master in person would create a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority,

the master is responsible in damages to the injured servant if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if *he is clothed with apparent authority to direct and command*, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow-servant in the sense that the common master is relieved of responsibility for injuries resulting from his imprudent conduct or negligent act" (Record, pages 203-4, Assignment of Error No. 10).

IX.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a *fellow-workman not in authority over him*. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant, but what is known in law as a vice-principal. Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work cannot be shifted by the master and the agent representing the master in the premises must perform that duty, and if

he fails through negligence, the negligence is that of the master" (Record, page 204, Assignment of Error No. 11).

X.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"Assumption of risk is a rule of law which imposes upon an employee risk of the ordinary dangers of his employment. That is, the dangers necessarily attendant upon the employment and hazard of accident which may occur in course of its employment after all reasonable safeguards for the prevention of accidents have been adopted. The employee who accepts service in a dangerous employment assumes the risk of accidents which may occur notwithstanding the usual and approved safeguards have been taken to avoid them. But if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work and safe appliances and tools, he is liable to resulting injury to employees if his negligence is the direct and immediate cause of the injury or is an efficient cause in its occurrence. The law of contributory negligence, which fixes the blame upon an employee for an accident resulting in his injury, where the failure on his part contributes to the mishap, does not excuse the employer, if the accident could not have happened or the injury resulted but for the conditions arising from the employer's negligence" (Record, pages 204-5, Assignment of Error No. 12).

XI.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

“Instruction:

“Certain duties are said to be nondelegable. By this is meant that such duties are personal to the master, and he cannot delegate them to a servant and then escape liability, if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if a duty is personal to the master the one to whom he entrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties” (Record, pages 205-6, Assignment of Error No. 13).

XII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

“Instruction:

“A servant is not guilty of contributory negligence when he is injured by an accident which could not happen in the ordinary course of the employment in which he is engaged, if the master had taken reasonable care to avoid the accident or to prevent the conditions which made it possible, even though its possibility is known to the servant, because he has a right to rely upon the be-

lief that the master will not allow needlessly unsafe conditions to exist" (Record, page 206, Assignment of Error No. 14).

XIII.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

"Instruction:

"On the question of damages you are instructed that if you find by a preponderance of the evidence that the allegations of the plaintiff's complaint were true and that the plaintiff was injured by the negligence of the defendant and while exercising reasonable and ordinary care for his own safety, as explained to you in these instructions, you will then consider the question of the damages which the plaintiff is entitled to recover, and in considering this, you may consider the nature and degree of the injuries received by the plaintiff, whether or not they are permanent and prevent the plaintiff from following his occupation, to wit: that of a miner; his physical condition and age at the time of the accident; the wages he was able to earn; the suffering caused him by such injuries and his expectancy or probable length of life; and also the loss to him by his inability to earn a living by being able to follow his said vocation, if you find by reason of such injuries that he is unable to do so" (Record, pages 206-7, Assignment of Error No. 15).

XIV.

The Court erred in giving the following instruction, which was excepted to by plaintiff in error and exception allowed:

“Instruction:

“In this case your verdict should be in accordance with the preponderance of the evidence; that is to say, a person who affirmatively alleges a thing has the burden of proof as to that particular thing and must prove the same by a preponderance of the evidence. And in this case it is incumbent upon the plaintiff to establish by a preponderance of the evidence all of the affirmative allegations of his complaint; and it is incumbent upon the defendant to establish by a preponderance of the evidence all the affirmative allegations set up in its answer.

“The preponderance of the evidence means the weight of the evidence and if the scales are equally balanced between the parties on any question at issue, you should determine that question or issue against the one having the affirmative of that particular question or issue” (Record, pages 207-8, Assignment of Error No. 16).

XV.

The Court erred in refusing to give instruction No. 2 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 2:

“You are instructed that the plaintiff bases his cause of action upon the defendant’s negligence in

that the plaintiff claims that the defendant negligently, recklessly and wantonly failed and neglected to make sufficient examination of the wall in the glory hole where the plaintiff was working after shots had been fired in said glory hole and to bar down all loose rock and earth adhering to said wall, or to remove from the wall all loose portions unsettled by the shots mentioned in the complaint. You are instructed that before the plaintiff can recover in this action it will be necessary for him to prove by the preponderance of the evidence that the defendant did not make sufficient examination of the wall complained of in the complaint, from which the rock and earth had been detached, and prove that at or before the time he entered this place to perform his work that there was loose rock and earth adhering to the wall, and must further prove that the defendant failed to remove from the wall all loose portions unsettled by shots mentioned in the complaint and still adhering to the wall, and unless the plaintiff establishes these facts by the preponderance of the evidence, you are instructed he cannot recover in this action" (Record, pages 208-9, Assignment of Error No. 17).

XVI.

The Court erred in refusing to give instruction No. 3 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 3.

"You are instructed that before the plaintiff can recover in this action he must show that he exercised ordinary and reasonable care, that is, such

care as an ordinary, prudent person would exercise under the same circumstances, the degree of care which must be taken by the plaintiff must be adjusted to the character of the work and it should be commensurate with the dangers of the employment" (Record, page 209, Assignment of Error No. 18).

XVII.

The Court erred in refusing to give instruction No. 4 requested by the appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 4:

"You are instructed that if you find from the evidence there was a rule in existence at the defendant's mine requiring all workmen to examine the place or places where they were working to see that such places were safe to work in and about, you are then instructed that the law presumes this rule was known to the plaintiff at the time he was injured and when he entered the place where he was injured" (Record, page 209, Assignment of Error No. 19).

XVIII.

The Court erred in refusing to give Instruction No. 5 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 5:

"You are instructed that if it was the duty of the plaintiff to make safe or assist in making safe the

place where he was working as the work progressed, then the plaintiff cannot recover in this action" (Record, pages 209-10, Assignment of Error No. 20).

XIX.

The Court erred in refusing to give Instruction No. 6, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 6:

"You are instructed that if it was the duty of the plaintiff to assist and help to bar down the loose earth, gravel and rock that caused his injury and he failed to do so, the plaintiff cannot recover in this action" (Record, page 210, Assignment of Error No. 21).

XX.

The Court erred in refusing to give Instruction No. 8, requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 8:

"You are instructed that the plaintiff alleges in his complaint that he was a miner and capable of earning the highest going wages paid to miners when opportunity offered, therefore he cannot recover for his injuries if same were caused by his inattention to his surroundings and failure to take due precautions against known or obvious dangers" (Record, page 210, Assignment of Error No. 22).

XXI.

The Court erred in refusing to give Instruction No. 9 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 9:

“You are instructed that if it was the duty of the plaintiff in this action to inspect the place where he was working to see if it was safe to work at the place or point where he was working, and he failed to make this inspection, you are instructed he cannot recover in this action” (Record, page 211, Assignment of Error No. 23).

XXII.

The Court erred in refusing to give Instruction No. 10 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 10:

“You are instructed that if the plaintiff knew, or if the dangers connected with the work were so patent and obvious that he either knew, or in the exercise of ordinary care should have known of their existence, he assumes the risk of injury from the dangers and defects of which he complains in his complaint” (Record, page 211, Assignment of Error No. 24).

XXIII.

The Court erred in refusing to give Instruction No. 13 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 13:

“You are instructed that if the plaintiff had actual or constructive knowledge of the dangers or unsafe condition of the place and he failed to take such precautions as a reasonably prudent man under similar circumstances would exercise to avoid the dangers, and is injured by reason of his failure to use such ordinary care, he is guilty of contributory negligence and cannot recover in this action” (Record, pages 211-212, Assignment of Error No. 25).

XXIV.

The Court erred in refusing to give Instruction No. 16 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 16:

“You are instructed that all persons who serve the same master, work under the same control, deriving authority and compensation from the same source and are engaged in the same general business, although it may be in different grades or departments of it, are fellow-servants” (Record, page 212, Assignment of Error No. 26).

XXV.

The Court erred in refusing to give Instruction No. 17 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 17:

“You are instructed that if the defendant by any of its agents, or servants, carefully examined the glory hole after the shots alleged in the complaint were fired and the person or persons making this examination thought or pronounced it safe, and such person or persons were coworkers and fellow-servants of the plaintiff, you are instructed the plaintiff cannot recover in this action” (Record, pages 212-213. Assignment of Error No. 27).

XXVI.

The Court erred in refusing to give Instruction No. 18 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 18:

“You are instructed that the plaintiff alleges in his complaint that *‘he is a miner by occupation, at which employment he was able to earn when opportunity offered, and had earned and received, the highest wages as a miner.’* This allegation you must consider as true as there has been no evidence offered by the defendant to contradict this allegation. Therefore, if you find from the evidence that the plaintiff prior to receiving the injuries complained of, had knowledge, or from his experience and knowledge imputed to him as

a miner, had knowledge of facts such as would lead a man of his experience and knowledge to believe that there was danger of injury from falling rocks and earth at the place where the injury occurred, and with such knowledge he continued to work without notifying the proper officers of the defendant company of such danger and while continuing to work at this place received the injury complained of, then, in that case, you are instructed the plaintiff cannot recover in this action" (Record, page 213, Assignment of Error No. 28).

XXVII.

The Court erred in refusing to give Instruction No. 20 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 20:

"You are instructed that before you can find that shift boss or foreman Green was a vice-principal and that it was his duty as such foreman to provide a reasonably safe place for the men under his direction to work and to see and provide after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning be detached, it is necessary that you first find from the evidence introduced by the plaintiff that the defendant corporation entrusted this duty upon this foreman, and unless you find from the evidence that the defendant corporation did delegate to shift boss or foreman Green the duty of providing the place for work for the plaintiff, and require of him to provide that after a shot was fired in the wall of the glory hole no loosened fragments were allowed to remain upon the

wall, you are instructed the plaintiff cannot recover in this action by reason of any negligence of shift boss or foreman Green" (Record, pages 213-214, Assignment of Error No. 29).

XXVIII.

The Court erred in refusing to give Instruction No. 21 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 21:

"You are instructed that if you find from the evidence that it was the duty of the plaintiff and his fellow-workmen to make safe the place of work as it progressed and to bar down all loosened rock and earth after shots had been fired, the master's or defendant's duty is fulfilled when he furnishes them with suitable material and implements for doing this work, and if the plaintiff or any of his fellow-servants failed or neglected to make the place safe, or failed to bar down the loose earth and gravel which caused the plaintiff's injury, he cannot recover in this action" (Record, pages 214-215, Assignment of Error No. 30).

XXIX.

The Court erred in refusing to give Instruction No. 22 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 22:

"You are instructed that the plaintiff in this case has introduced in evidence that by the rules of the defendant company it was the duty of the plaintiff

along with the other men working with him to assist in and bar down the loose rock, earth and gravel left after the shots had been fired, the plaintiff having introduced this in evidence he is bound by it where there is no evidence to the contrary, therefore, you are instructed if this rule made it the duty of the plaintiff to assist in and bar down the loose rock, earth and gravel that fell and injured him and he failed, neglected or refused to do so and was injured by reason of said earth, rock and gravel falling down and striking him, you are instructed he cannot recover in this case" (Record, page 215, Assignment of Error No. 31).

XXX.

The Court erred in refusing to give Instruction No. 23 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 23:

"You are instructed that the plaintiff failed to introduce in evidence what, if any, power or authority the shift boss or foreman Green had, or what authority or power or what duties the defendant company had entrusted to him or that he had authority or right to give any order or command which violated any rule of the company or prevented any rule of the company being carried out or that he had authority, or it was his duty to see or do anything regarding the safety of the place where the men were working; therefore, you are instructed that if the rules of the defendant company required the plaintiff, along with the other men working with him, to assist in and bar down the loose earth, rock and gravel left after the shots had been fired, you are instructed that it

was the duty of the plaintiff to assist in and bar down the loose earth, rock and gravel, that afterwards fell and struck him causing the injury, and this is true although the shift boss or foreman Green instructed him to start bulldozing, and if he failed or neglected to bar down the loose rock, earth and gravel that struck him, he cannot recover in this action" (Record, pages 215-216, Assignment of Error No. 32).

XXXI.

The Court erred in refusing to give Instruction No. 24 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

"Instruction No. 33:

"You are instructed that the plaintiff has failed to introduce or show in evidence that the shift boss or foreman Green advised or told the plaintiff that he need not bar down the loose rock and earth that the plaintiff claims struck him or that anyone else told him this or informed him that the shift boss or foreman Green had said not to bar down the loose rock and gravel that struck the plaintiff; therefore you are instructed that if the rule of the company required that he do or assist in barring down this earth, you are instructed that it was the duty of the plaintiff to do so although the foreman had advised him to begin bulldozing, and if he failed to bar down said earth, rock and gravel and was injured by reason of said earth, rock and gravel not being barred down, you are instructed he cannot recover in this action" (Record, pages 216-217, Assignment of Error No. 33).

XXXII.

The Court erred in refusing to give Instruction No. 25 requested by appellant, to which exception was taken and allowed. Said instruction was as follows:

“Instruction No. 25:

“You are instructed that no evidence was introduced showing that the earth which struck the plaintiff causing the injury was earth or rock that had been loosened by the shots that had been fired at the time alleged in the complaint to have been fired or that the earth and rock which struck the plaintiff was earth and rock that should have been barred down or looked after by the defendant, and before you can find for the plaintiff in this case it is necessary that he prove that the earth and rock which struck him was earth and rock that had been loosened by the shots complained of in the complaint and that should have been barred down, and unless you so find from the evidence introduced in this case, you are instructed the plaintiff cannot recover” (Record, pages 217-218, Assignment of Error No. 34).

ARGUMENT.

The questions of law suggested by this record naturally group themselves about certain general subjects. These are the duty of the defendant with respect to furnishing plaintiff a safe place to work; the question whether such duty is a continuing one, and non-delegable, or whether the duty of keeping the place safe was properly delegated to the servants themselves in an instance such as the one at bar where the character of the place was constantly changing by reason of the work which was being done; the extent of the authority of the shift boss, Green, and whether he was a fellow servant of plaintiff, or defendant's vice-principal; the effect of plaintiff's failure to inspect the bank surrounding the glory hole before he took up his work therein after returning from dinner; the effect of the assurance given by the shift boss that the banks were safe; the application of the doctrine of assumption of risk; the application of the doctrine of contributory negligence. In addition to these a question squarely presented by this record is the effect of the failure of plaintiff to reply to the affirmative defenses set out in the defendant's answer. Our contention with respect to these various matters may be briefly stated as follows:

First: Defendant affirmatively pleaded in its answer:

- a. *That the accident referred to in the complaint*

was one of the risks incident to his employment which was assumed by plaintiff;

b. That plaintiff's injuries were due to his own negligence;

c. That plaintiff's injuries were due to the negligence of a fellow servant.

Plaintiff did not reply to these defenses and therefore admitted them, and defendant was entitled to judgment.

Second: The defendant was not charged with the duty of keeping the glory hole safe from dangers incident to the progress of the work since a master is not obliged to keep the place of work free from dangers incident to the progress of the work for which the employee is engaged.

Third: Plaintiff and his fellow employees were charged with the duty of inspecting and keeping safe the glory hole in which they were working.

Fourth: The shift boss was a fellow servant of plaintiff and not a vice-principal of defendant.

Fifth: The plaintiff was guilty of contributory negligence in that he failed to inspect the banks surrounding the glory hole, before he took up his work therein.

Sixth: The assurance given by the shift boss that the banks were safe was simply the negligent act of a fellow servant for which defendant was not responsible.

Seventh: The danger incident to the blasting and removal of the banks of the glory hole was one of the risks incident to his employment which was assumed by the plaintiff.

In this behalf we submit the following authorities on the points involved:

First: DEFENDANT AFFIRMATIVELY PLEADED IN ITS ANSWER:

A. THAT THE ACCIDENT REFERRED TO IN THE COMPLAINT WAS ONE OF THE RISKS INCIDENT TO HIS EMPLOYMENT WHICH WAS ASSUMED BY PLAINTIFF;

B. THAT PLAINTIFF'S INJURIES WERE DUE TO HIS OWN NEGLIGENCE;

C. THAT PLAINTIFF'S INJURIES WERE DUE TO THE NEGLIGENCE OF A FELLOW SERVANT.

PLAINTIFF DID NOT REPLY TO THESE DEFENSES AND THEREFORE ADMITTED THEM, AND DEFENDANT WAS ENTITLED TO JUDGMENT.

An examination of the record, page 8, shows that these defenses were affirmatively pleaded, and later the failure to deny or otherwise plead to the affirma-

tive defenses was made one of the express grounds for a motion for a directed verdict (See record, pages 13-14). The practice in Alaska is prescribed by the Compiled Laws, section 901, which reads as follows:

"Sec. 901. If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the Court, the defendant may move the Court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages."

An interesting case on this subject is found in *State ex rel Montana Central Railway Co. vs. District Court*, 79 Pac., 546, 549, in which the Court used the following language:

"It is to be noted in the first instance that the defendant had pleaded in its answer contributory negligence on the part of the plaintiff and negligence of the fellow servants of the plaintiff as special defenses. Whether the defense of negligence of a fellow servant is a special defense which must be pleaded is unnecessary to be determined here. The authorities are conflicting upon the question. But contributory negligence on the part of the plaintiff in an action of the character of this one is such a special defense, and must be pleaded by the defendant. This doctrine has the support of an unbroken line of authorities in this State from *Higley vs. Gilmer*, 3 Mont., 90, 35 Am. Rep., 450, to the recent case of *Nord vs. Boston & Montana C. C. & S. M. Co.*, 30 Mont., 48, 75 Pac., 681. See also, 2 *Current Law*, 1007; 5 *Enc. Pleading & Practice*, 1, and cases cited. The pleading

of this defense constituted new matter within the meaning of section 720 of the Code of Civil Procedure, as amended by an act of the Legislature approved February 22, 1899 (*Sess. Laws 1899*, p. 142); and any mere anticipatory denials in the complaint of the facts constituting this special defense were insufficient (*L. & N. R. Co. vs. Paynter's Adm'x.* (Ky.) 82, S. W., 412), and the failure to reply to such allegations of new matter was an admission on the part of the plaintiff of the truth of the facts therein set forth if those facts were sufficiently pleaded. Section 722 of the Code of Civil Procedure as amended by the act of 1899, above provides: 'If the answer contains new matter and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on notice for such judgment as he may be entitled to upon such statement, and the Court may thereupon render judgment,' etc. The method of procedure provided in this section, namely, a motion for judgment on the pleadings, was followed and then it became the plain legal duty of the Court to pass upon such motion, involving as it did a consideration of the facts and the law of the case, the same having been argued and submitted unless something intervened to relieve the Court of this duty."

And it was held in *Thomson vs. Allen*, 1 Alaska, 636, where a defendant set up an affirmative defense in his answer, and there was no reply to that affirmative defense that the defendant was entitled to judgment by default against the plaintiff for want of such reply.

So in *Haines vs. Connell*, 87 Pac., 265-267, the Court held that affirmative matter set up by defendant

in his answer must be regarded as true unless denied by plaintiff, and "that the want of such denial is an admission of their truth, and no proof was required."

So in *Benecia Agricultural Works vs. Creighton*, 30 Pac., 676, the Oregon Court held that "a plea of "payment in the answer is new matter and must be "denied or it stands admitted. The plaintiff cannot "by alleging in his complaint that no payments have "been made anticipate this defense and thus relieve "himself from the necessity of replying to it when it appears in the answer."

Babcock vs. Farmers' and Drovers' Bank is a similar case in which it was held that unless new matter or affirmative defense was denied by plaintiff it was admitted as true, and that defendants were entitled to judgment on the pleadings, and that the Court was in error in proceeding with the trial of the case without requiring a denial of this new matter.

To the same effect is *Baker vs. Van Ness*, 105 Pac., 660, where the Supreme Court of Oklahoma holds that when an answer sets up material allegations of new matter, and the same is uncontroverted by a reply, the new matter should be taken by the Court as true; when, if true, it constitutes a complete defense to the action defendant is entitled to a judgment on the pleadings.

Other cases in support of our contention are as follows:

Indiana:

Kennard vs. Carter, 64 Ind., 31;
Stoops vs. Greensburgh, etc. Plank-Road Co.,
 10 Ind., 47.

Kansas:

Ballinger vs. Lantier, 15 Kan., 608;
Aiken vs. Franz, 2 Kan. App., 75; 43 Pac., 306.

Minnesota:

Webb vs. O'Donnell, 28 Minn., 369; 10 N. W.,
 140.

Missouri:

Girard vs. St. Louis Car Wheel Co., 123 Mo.,
 358; 27 S. W., 648; 45 Am. St. Rep., 556;
 25 L. R. A., 514;
Huber Mfg. Co. vs. Hunter, 87 Mo. App., 50;
Rich vs. Donovan, 81 Mo. App., 184;
Cordner vs. Roberts, 58 Mo. App., 440.

Nebraska:

Western Horse, etc. Ins. Co. vs. Timm, 23
 Nebr., 526; 37 N. W., 308;
Williams vs. Evans, 6 Nebr., 216.

Ohio:

Knauber vs. Wunder, 5 Ohio Dec. (Reprint),
516; 6 Am. L. Rec., 366.

Oregon:

Minard vs. McBee, 29 Oreg., 225; 44 Pac., 491.

United States:

Hathaway vs. New York Mut. L. Ins. Co., 99
Fed., 534.

SECOND: THE DEFENDANT WAS NOT CHARGED WITH THE DUTY OF KEEPING THE GLORY HOLE SAFE FROM DANGERS INCIDENT TO THE PROGRESS OF THE WORK SINCE A MASTER IS NOT OBLIGED TO KEEP THE PLACE OF WORK FREE FROM DANGERS INCIDENT TO THE PROGRESS OF THE WORK FOR WHICH THE EMPLOYEE IS ENGAGED.

Defendant was entitled to a verdict in this case for the reason that the evidence shows no negligence whatsoever upon its part, either directly or indirectly contributing to the injury of plaintiff. The rule is well established that "where the work is of such a character that, as it progresses, the environment of the servant must necessarily undergo frequent changes the master is not bound to protect the servants engaged in it against the dangers resulting from those changes. The cases in which this principle

"is most usually applied are those involving the various kinds of construction work." 2 *Labatt on Master and Servant*, Section 588.

A careful study of the record shows that the trial Court utterly failed to appreciate the rule which should properly have been applied to the case. The glory hole in which Pedrin was injured was 14 to 15 feet wide, 20 feet long and about 10 to 12 feet deep. Pedrin was one of the night shift, and started to work at 7 o'clock on the night in question (See record, page 25). The work was in charge of a shift boss, and from 7 up to 11:20, when the men went to dinner Pedrin was working in the hole breaking the rock and shoveling ore on to the shaft, or mucking, and two men were working on the top edge of the glory hole drilling a hole for a discharge of dynamite. As Pedrin says they had the powder in and the load ready to shoot when the gang quit and went to dinner (See record, pages 26 and 27). The man who fired the shot followed Pedrin to dinner. Pedrin heard the shot fired while he was at the table (pages 50, 51). After dinner the gang returned to the glory hole. What was usually done after the discharge of a shot on the edge of a glory hole is shown by the questions and answers (page 27) as follows:

"Q. Now, after they fire off a shot in that glory hole what do they usually do first?

"A. Well, they always give us orders what we have got to do, so that night he gave me orders to

go and clear up that shaft and bulldoze that big rock that fell down.

"Q. After they fire off a blast in the hole what is the first thing they do—do they do anything about the walls?

"A. Yes.

"Q. What do they do?

"A. They just take the loose stuff down, bar down.

"Q. How do they do that?

"A. They get bars and hammer and wedges, or if they don't, they get some powder, put it in the crack and fire it down.

"Q. I understand they go around with bars or hammers and try to break down the loose rock that has been left hanging, that didn't break clear off?

"A. Yes, they do that any place I work."

When Pedrin reached the glory hole the shift boss said to him, "I want you to go as quick as you can and get those big boulders cut down." Pedrin first went after the powder and then at once started to resume his work of bulldozing the rocks at the bottom of the glory hole (see record, page 52). He had seen the drillers working on the edge of the ditch from 7 to 11:20 that evening (see record, page 70), and he knew that they had the powder in and a load ready to shoot at the time they went to dinner (see record, page 26).

It is apparent from this testimony, and the testimony of John Schmitt (pages 89 to 91), that the work of this gang consisted in gradually enlarging the glory hole by the blasting done of its sides, and the extracting of the ore therefrom. Pedrin, the plaintiff, had

been working for about two weeks on this night shift (page 96), and he had been working about the pit and its sides for about two months (see record, page 34). It is manifest from this that the place where Pedrin and his associates were working was one which constantly changed by reason of the progress of the work which they were doing. Each day the glory hole was widened by the cutting away of its sides, and the drillers on top, and the muckers beneath, were working together in the common task of quarrying or mining the ore. Under these circumstances we respectfully submit that the trial Court erred in instructing the jury as it did in the instruction pointed out in the foregoing specifications of error.

The learned trial Judge instructed the jury, among other things, that "the duty of providing a safe place
"to work cannot be shifted by the master, and the
"agent representing the master of the premises must
"perform that duty, and if he fails, through negligence, the negligence is that of the master"; and the learned trial Judge also charged the jury "if the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to
"the hazards of the business, by providing a safe
"place to work, and safe appliances and tools, he is
"liable for resulting injuries to employees." By these instructions the Court told the jury that it was the duty of the master to keep this place of work safe, and that that duty called upon him to exercise a de-

gree of care corresponding to the dangers that were present; in other words, if there were danger of the banks caving by reason of the progress of the work it was his duty to constantly inspect the bank and safeguard the servant. This practically makes the master an insurer of the safety of the place or work, and calls upon him to exercise ceaseless vigilance to see that through the very work the men were doing no caving should result to the injury of any servant. The rule, however, as we have shown above, is far different from this. Not only is the duty of keeping the place safe, one which can be delegated, but the uniform rule of law is that in such circumstances as the one at bar such duty, if it exists at all, is delegated to the employee and his fellow servants, and if the place to work is safe at the time the shift goes on duty then the master incurs no liability for accidents which arise by reason of the fact that his workmen failed to keep that place safe.

A large number of cases are to be found in our reports illustrative of this rule, and we know of none where the Court has held to the contrary, save in such instances as are governed by special statutes.

The rule is stated by Sanborn, Circuit Judge, in *Minneapolis vs. Ludin*, 7 C. C. A., 344, 348; 19 U. S. App., 245, 251, as follows:

“It was the duty of the master to use reasonable care and diligence to furnish a safe place for the defendant in error to perform his service in, and

it is claimed that it was a breach of this duty for the foreman to send him to reload these holes without notifying him that there was dynamite in one of them; but the duty of a master to furnish a safe place for the performance of work does not require him to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. *The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress.* It was the duty of each workman to use reasonable care so to render his service that the place in which he and his fellow-servants were required to labor should continue to be reasonably safe. It was the duty of the foreman so to direct the work of excavating, or laying the pipe and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master.

"The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. *If the safe place originally furnished by the city became unsafe in the progress of the work it was rendered so not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts, and this negligence the city was not responsible.* Each

employee assumed the risk of this negligence of his fellow-servants when he entered the common employment. *Armour vs. Hahn*, 111 U. S., 313; *Bunt vs. Sierra Butte Gold Mining Company*, 138 U. S., 483; *Killea vs. Faxon*, 125 Mass., 485.

"The result is that the foreman was not the vice-principal of the city, but was the fellow-servant of the defendant in error in the performance of the only act of negligence disclosed by the record, and the Circuit Court should have instructed the jury to return a verdict in favor of the city. Chicago and Northwestern Railway Company vs. Hoedling's Administrator, 10 U. S. App., 422; *Gowen vs. Harley*, 12 U. S. App., 574, 585; *Monroe vs. British and Foreign Marine Insurance Company, Limited*, 5 U. S. App., 179; *North Pennsylvania Railroad Company vs. Commercial Bank of Chicago*, 123 U. S., 727, 733; *Delaware, Lackawanna and Western Railroad Company vs. Converse*, 139 U. S., 469; *Texas and Pacific Railway Company vs. Cox*, 145 U. S., 593-606; *Meehan vs. Vanantine*, 145 U. S., 611, 618."

And the same learned Judge in *Finlayson vs. Utica Mining & Milling Co.*, 14 C. C. A., 492; 32 U. S. App., 143; 67 Fed., 507, analyzes the rule as follows:

"It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. Union Pacific Railway Company vs. Jarvi, 10 U. S. App., 439. *But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every*

moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them. *Armour vs. Hahn*, 111 U. S., 313, 318; *Minneapolis vs. Lundin*, 19 U. S. App., 245, 252; *Gulf, Colorado and Santa Fe Railway Company vs. Jackson* (2), 27 U. S. App., 519.

"These cases warrant the instruction given by the court below. Austin and Finlayson were engaged in stoping out ore and timbering the space opened by the stoping. The blasting necessarily made the place opened by it insecure. There was constant danger of the fall of material loosened by the blast. The mass which fell was not visible or dangerous until the morning blast disclosed it. Not only this, but it was probably the very work of making this place safe, that Finlayson himself performed, that was the immediate cause of the accident. The gouge had resisted the efforts of workmen with picks, but it was doubtless loosened from its place by the jarring of the foot wall upon which it rested by Finlayson's drilling. It was not the negligence of the company or its foreman, but the necessary progress of this work, that made the place dangerous, and the dangers from the fall of these loosened materials, which some one must take in order that the timber should be placed in

the mine at all, Finlayson voluntarily assumed when he entered upon this employment."

So it is said in the case of *Citrone vs. O'Rourke Eng. Cons. Co.*, 188 N. Y., 339:

"It is apparent from this and all the other evidence in the case relating to the character of the work and the manner in which it was being conducted that, whatever was the danger to which the men were exposed, it was due to the manner in which the work was prosecuted. The degree of safety near the head of the trench was constantly subject to change as the trench was extended. *Under such circumstances, the rule of law which makes it incumbent upon an employer to provide or maintain a safe place in which his employees are to do their work has no application.* As was said by Mr. Justice Cullen in *O'Connel vs. Clark*, 22 App. Div., 466; 48 N. Y. Supp., 74, '*the principle of a safe place does not apply where the prosecution of the work itself makes the place and creates its dangers*'; and by the same judge in *Stourbridge vs. Brooklyn City R. Co.*, 9 App. Div., 129; 41 N. Y. Supp., 128: 'The rule that the master must provide a safe place for work only applies where the work and the place are not connected, where the work is not the construction of the place as in the case of a mill, a factory, mine, ship, well, etc.'"

And in the case of *Russell vs. Lehigh Valley R. Co.*, 188 N. Y., 344, the Court says:

"Negligence is, generally, charged against the defendant for the failure to furnish a safe place for the plaintiff to work in, and suitable tools and appliances for doing the work of excavation. Par-

ticularly, it is insisted that the defendant was neglectful of the duty to furnish explosives, with which to break off, or to prevent, overhanging ledges; and the case was submitted to the jury upon that theory. The jurors were told, in effect, that the plaintiff's case depended upon the evidence establishing that the accident was the result of the lack of explosives. This was not a case for the application of the rule that the master must furnish a reasonable safe place. The place where the men were to work changed from day to day, as the steam shovel moved on in its operations. It was, necessarily, such as the conformation of the embankment and the process of excavation made it. The kind of work which the men were employed to do was such as to make the possibility of a fall of earth an ever present one, and called for the exercise of active vigilance to guard against their being involved in it. The situation was one which made it the duty of the foreman to watch each supervening condition during the progress of the work, and to warn the men. They were not excused themselves, of course, from being vigilant to observe conditions. The master's liability in this case is determined by common-law rules, and is not predicated upon statute. If the defendant set the men at work under a competent foreman and with suitable appliances, it had performed its duty towards them, and the execution of the details of the work could properly be intrusted to the judgment of the foreman. For his negligence, or for his mistakes in judgment, as to such, it could not be made liable for injurious results.

"A jury's speculation upon the situation can not be allowed to affect the question of the master's liability. The performance of the work was committed to the foreman's supervision and judgment, and there is no complaint of his lack of skill. If

he chose to operate his shovel solely upon the bank, when a better judgment would advise the resort to additional methods for breaking it down, the fault was his, and not that of the defendant. If he failed to be watchful, and omitted to warn the plaintiff seasonably of the peril, again, the latter suffered from the fault of his fellow servant. The thing to be done at the time was a detail of the common work upon which all were engaged. The caving in of the bank was the result of the operation of the shovel. The ledge that fell was the condition of that day, and not a condition that had existed, and the cause of its fall was the removal of the earth beneath."

Another case in point is *Petaja vs. Aurora Iron Mining Co.*, 106 Mich., 463, 32 L. R. A., 435, 52 Am. St. Rep., 505, 64 N. W., 335, 66 N. W., 951, where the Court says:

"The claim of the plaintiff is that the master did not furnish a safe place to work. In our opinion, this place where the men were at work was an incident of mining. It was a result of the common work of the miner and the trammer, both of whose labor combined to make it. After the miner had loosened the ore, and the trammer had removed it, it was ready for the timber men, who followed up, when notified, putting in sets, which enabled the process of mining to be carried further. The undisputed evidence shows that the trammers and miners had not put the newly opened space in condition for the timber men, and that the miners had not caused them to be notified that their services were required. If there can be said to have been culpable negligence, it was either in mining too large a space before cutting out the corners preparatory for the sets, or in failing to

notify the timber men if sets could have been put in before the ore was still further removed. *In either case, if the fault of the miner, it was the negligence of a fellow-servant under the plainest rules. And the same is true if it was through a failure upon the part of the shift boss to cause timbering to be done earlier.* He was a foreman, who directed when and where blasts should be put in, and where the men should work, and who was appealed to to settle questions arising as the work progressed. His relation to the men under him was similar to that of a foreman of a section gang upon a railroad to his men, or one in charge of workmen upon a train. *Schroeder vs. Flint & P. M. R. Co.*, 103 Mich., 213, 29 L. R. A., 321. Unless it can be said that the duty to furnish a safe place to work is involved, the Court was right in directing a verdict for defendant. There are duties which a master owes to employees, which he must perform; and, while he may confide the performance of such to another, the obligation is still the master's and he cannot avoid it by authorizing another to perform the act. In such cases it is not an answer to say that he has provided a competent agent, although such agent may be a fellow servant, and in many things a fellow servant of the injured person. This question has been discussed of late, and authorities cited, in the opinion of Mr. Justice Montgomery in the case of *Schroeder vs. Flint & P. M. R. Co.*, *supra*."

And the Michigan Court affirmed the judgment holding the duty of providing a safe place to work under the facts of the case did not rest on the master and that therefore with respect to that duty the shift boss was a fellow servant of the injured employee.

This rule is illustrated by the following well-considered cases:

- Hanley vs. California, etc., Co.*, 127 Cal., 232;
Thompson vs. California Construction Co., 148 Cal., 35;
Pre-Standard Portland Cement Co., 9 Cal. Ap. Rep., 591;
Swanson vs. Lafayette, 33 N. E. (Ind.), 1033; 134 Ind., 625;
Vincennes Water Supply Co. vs. White, 24 N. E. (Ind.), 747; 124 Ind., 376;
Griffin vs. Ohio & M. Ry. Co., 24 N. E. (Ind.), 888; 124 Ind., 326;
Michaelson vs. Sergeant, B. & S. G. Brick Co., 62 N. W. (Iowa), 15; 94 Iowa, 725;
Quinn vs. Baird, 63 N. Y. Supp., 235; 49 App. Div., 270;
Van Derhoff vs. N. Y. C. & H. R. R. Co., 88 App. Div. (N. Y.), 418;
Durst vs. Carnegie Steel Co., 173 Pa., 162, 165; 33 Atl., 1102;
Petaja vs. Aurora Iron M. Co., 106 Mich., 463; 58 Am. St. Rep., 505; 64 N. W., 335; 66 N. W., 951;
Anderson vs. Daly Mg. Co., 16 Utah, 28; 50 Pac., 815;
Minneapolis vs. Lundin, 7 C. C. A., 344, 348; 19 U. S. App., 245;
Mielke vs. Chicago, etc. Ry. Co., 103 Wis., 1, 5;

- Perry vs. Rogers*, 157 N. Y., 251;
Capasso vs. Woolfolk, 163 N. Y., 472;
Litchfield vs. Buffalo R. & P. Co., 73 App.
 Div., 1; 76 N. Y. S., 80;
Bertolani vs. United Eng. & C. Co., 120 App.
 Div., 192; 105 N. Y. S., 90;
McKenzie vs. Philadelphia, 8 Pa. Co. Ct., 293;
Beique vs. Hosmer, 169 Mass., 541;
Maloney vs. Florence & C. C. R. Co., 39 Colo.,
 384; 89 Pac., 649; 19 L. R. A. (N. S.), 348;
Citrone vs. O'Rourke Eng. Cons. Co., 188 N.
 Y., 339; 80 N. E., 1092; 19 L. R. A. (N. S.),
 340;
Loughlin vs. New York, 105 N. Y., 159;
DeVito vs. Crage, 165 N. Y., 378;
Greeley vs. Foster, 75 Pac., 351; 32 Colo., 292;
Russell vs. Lehigh Valley R. R. Co., 188 N.
 Y., 344; 81 N. E., 122; 19 L. R. A. (N. S.),
 344;
Coal, etc. Co. vs. Clay, 51 Ohio St., 542.
Baird vs. Reilly, 92 Fed., 884;
Kennedy vs. Grace & Hyde Co., 92 Fed., 116;
Seittn vs. Alaska Treadwell Gold M. Co., 2
 Alaska, 8, 31.

And the foregoing rule has been held to be peculiarly applicable to mining cases as may be seen from

the following decisions taken from all parts of the country:

Olsen vs. Maple Grove & Min. Co., 115 Iowa,
74; 87 N. W., 736;

Holland vs. Durham Coal & Coke Co. (Ga.),
63 S. E., 290;

Finlayson vs. Utica Min. & Mill. Co., 14 C.
C. A., 492; 32 U. S. App., 143; 67 Fed., 507;

Russell Creek Coal Co. vs. Wells, 96 Va., 416;
31 S. E., 614;

Smith vs. North Jellico Coal Co. (Ky.), 114
S. W., 785;

Petaja vs. Aurora Iron Min. Co., 106 Mich.,
463; 32 L. R. A., 435; 58 Am. St. Rep.,
505; 64 N. W., 335; 66 N. W., 951;

Island Coal Co. vs. Greenwood, 151 Ind., 476;
50 N. E., 36;

Rolla vs. McAlester Coal Co., 6 Ind. Terr.,
404; 98 S. W., 141;

Coal & Min. Co. vs. Clay, 51 Ohio St., 542;
25 L. R. A., 848; 38 N. E., 610;

Heald vs. Wallace, 109 Tenn., 346; 71 S.
W., 80;

Smith vs. Hecla Min. Co., 38 Wash., 454; 80
Pac., 779;

Moon-Anchor Consol. Gold Mines vs. Hop-
kins, 49 C. C. A., 347; 111 Fed., 298;

Superior Coal & Min. Co. vs. Kaiser, 229 Ill.,
29; 120 Am. St. Rep., 233; 82 N. E., 839;

Illinois Steel Co. vs. Olste, 116 Ill. App., 303,
affirmed in 214 Ill., 181; 73 N. E., 422;
Pantzar vs. Tilly Foster Iron Min. Co., 99
N. Y., 368; 2 N. E., 24;
Faulkner vs. Mammoth Min. Co., 23 Utah,
437; 66 Pac., 799;
Bird vs. Utica Gold Min. Co., 2 Cal. App.,
674; 84 Pac., 256;
Western Invest. Co. vs. McFarland, 166 Fed.,
76.

The rule has been also applied uniformly to the excavating of quarries as may be seen from the following cases:

Thompson vs. California Constr. Co., 148 Cal.,
35; 82 Pac., 367;
Utica Hydraulic Cement Co. vs. Whalen, 117
Ill. App., 23;
Welch vs. Carlucci Stone Co., 215 Pa., 34;
64 Atl., 392; 7 A. & E. Ann. Cas., 299;
Mielke vs. Chicago & N. W. R. Co., 103
Wis., 1; 74 Am. St. Rep., 834; 79 N. W., 22;
Zeigenmeyer vs. Goetz Lime & Cement Co.,
113 Mo. App., 330; 88 S. W., 139;
De Vito vs. Crage, 165 N. Y., 378; 59 N. E.,
141, reversing 35 App. Div., 155; 55 N. Y.
Supp., 64.

We respectfully submit that in view of the foregoing authorities the trial Court erred in instructing

the jury as it did, and refusing the instruction requested by defendant charging that the master was not responsible for such dangers as were presented by the changing conditions of the place to work, which changes arose out of and were caused exclusively by the work done by the men.

It will be noted in this connection that plaintiff's complaint attributed the caving partly to the discharge of a shot in the afternoon, before he went to work (see record, page 2). There is, however, absolutely no evidence in the record which even hints at such a state of facts. Pedrin does not assume to say what was done before he went there; Schmitt is not bold enough to testify to a shot before he came there at 7 o'clock, and no other witness was called, or evidence presented upon the subject. In this respect therefore, the proof offered by plaintiff fails and we respectfully submit that the evidence shows the place was safe when they originally went to work; that it was safe between the hours of 7 and 11:20 p. m., and the danger which was presented to the men on their return from dinner was one which grew out of the work they were doing, and was well known to them and one which they alone were called upon to guard against. A master cannot constantly be at the edge of the glory hole safeguarding his men in their work day and night from dangers which they themselves make, and which ordinary caution and prudence on their own part should prevent. On this

point alone defendant was entitled to have its motion for a non-suit granted. Plaintiff completely failed to establish any negligence on defendant's part, and the matter was squarely presented to the Judge on motion for non-suit, motion for directed verdict, motion for new trial, and in a variety of instructions.

THIRD: PLAINTIFF AND HIS FELLOW EMPLOYEES WERE CHARGED WITH THE DUTY OF INSPECTING AND KEEPING SAFE THE GLORY HOLE IN WHICH THEY WERE WORKING.

The statement of the evidence heretofore given clearly establishes that the gang of men who were engaged in this work were alone charged with the duty of inspecting and keeping safe the glory hole and its surroundings. Were the evidence silent upon this point the legal presumption would, as we have shown, be conclusive, but the quoted portion from page 27 of the record shows that the prying down of the loose portions from the bank was a part of the very task which these men were set to do. And not contented with this, plaintiff went on to introduce additional evidence on the topic.

Nothing could be more significant on this point than the statement of Pedrin on page 27, after they fired off a blast in the hole the first thing they do is about the walls.

"Q. What do they do?

"A. They just take the loose stuff down, bar down.

"Q. How do they do that?

"A. They get bars and hammer and wedges, or if they don't, they get some powder, put it in the crack and fire it down.

"Q. I understand they go around with bars or hammers and try to break down the loose rock that has been left hanging, that didn't break clear off?

"A. YES, THEY DO THAT ANY PLACE I WORK."

And the testimony of his companion, Schmitt, is replete with statements on this subject (see the record at page 92).

"Q. Where did you go to work again after lunch?

"A. We came after lunch at twelve o'clock and we start—I take the pinch bar and I want to pry this alongside of the glory hole where the shot went."

And again at page 83:

"Nothing doing; this ground is solid." I said, "By golly, I don't know; I have to try."

"Q. What did you do when you went to work, you and John?

"A. He told John and John went after powder and bring the powder and said, 'John, don't you want to bulldoze?' Green told me to bulldoze there at the top of the raise there, he want to draw for the chute, and I said, 'I don't take no chances until we bar down.'"

And again at pages 103 to 108:

"Q. You say you took a bar and tried to do something—what was that?

"A. Yes, I took a bar and tried to get loose the rock and bar down.

"Q. Bar what down?

"A. After the shot.

"Q. Why did you take a bar to bar it down?

"A. Because *I know the rule for firing—they have to look at this ground, if it is loose or not.*

"Q. What do you mean by rule?

"A. *A rule, when they are going to shoot any place, when they blast on a railroad or mine, they have to examine the place before they go to work.*

"Q. They have a rule there that you have to examine your place?

"A. Yes.

"Q. Is that known to everybody there?

"A. Yes, sir.

"Q. If there is any loose earth or rock there, after you make your examination, then you take your bar and bar it down?

"A. I have to make the examination and take the bar and find out whether it is loose or not.

"Q. And if it is loose, you bar it down?

"A. Yes, sir.

"Q. And what kind of a bar do you use for that?

"A. A pinch bar.

"Q. They furnish the bar?

"A. A company bar.

"Q. They require you to do that?

"A. *I don't know whether they require it or not but I like to save my life before I go down.*

"Q. And did you try to bar that down?

"A. No, he don't allow me to try—Mr. Green stopped me.

"Q. You took the bar and what did you start to do?

"A. I took the bar and walked from this end all around to the pit, to the glory hole on the other side, and Green came over and say, 'John,'

he say, 'I want you to bulldoze here on this raise. I want ore for this chute.' 'Well,' I say, 'I don't know. *I want to bar down before I go down.*' He said, 'Never mind; it is solid.'

"Q. He told you it was solid?

"A. Yes, he told me it was solid; he never was there—I don't know, but I never was there; he told me it was solid. I drop my bar then and he told me to go and get powder to bulldoze. I said, 'No, I don't get powder.' I said, 'I get no wages for powder monkey. I get wages for mucker,' and I stand there, and he went into the pit and called John Pedrin, and he went after powder and brought powder *and to John I say, 'I don't take no chances going down there.'*

"Q. *You said that to John?*

"A. *I said that to John.*"

And then continuing he says:

"Q. What did John say to you when you told him you took no chance going down there?

"A. He didn't say nothing.

"Q. He didn't say anything?

"A. No.

"Q. You didn't examine the place where they had made the shot, did you?

"A. He don't allow me to examine.

"Q. You didn't examine it?

"A. He don't allow me to examine.

"Q. Answer the question: Did you examine the place?

"A. He don't allow me to examine it. I want to examine it,—I took a bar but he stopped me.

"Q. Did you examine the place?

"BY THE COURT—Say yes or no, whether you examined it or not.

"A. No.

"Q. *Do you know if John examined the place?*

"A. NO.

"Q. You don't know?

"A. *I don't know.*

"Q. Then you didn't see the condition of the wall after the shot had been fired, did you?

"A. No, *it was all broke up there on the wall.*

"Q. Could you see that?

"A. *Sure, I can see that.*"

Again at page 108 Schmitt says:

"You have to examine this place when the shot is out, whether a man can go down or not; if he can't go down, we have to bar down the rock, take a bar and hammer and work it; you have to look at your roof to see whether it is safe or not—when you work in the pit, you have to look at your walls."

And at page 115 he says:

"Q. You said a while ago it is a rule all over the United States to bar down the walls after a shot?

"A. Yes—when a man wants to be safe.

"Q. You mean that is a rule of good mining or a statute law?

"A. Yes, that is a law of mining.

"Q. That is a rule of good mining?

"A. Yes."

This is all the language of the two workmen who were on the spot. Confirmatory of it is the testimony of the expert:

"The rule is that a man has got to bar down his ground to make it safe, not to have loose ground

in the walls after a blast—that is, if a man is going to work under it.

“Q. Where work is being done under the direction of a foreman or shift boss who looks after that?

“A. Why, the foreman or shift boss who is in charge.”

In view of such unanimous testimony, the latter part of which was admitted over the strenuous objection of defendant, we can hardly see how it lies in the mouth of the plaintiff to deny that it was a well settled rule that these workmen, and they alone, should inspect the edges surrounding the glory hole, and pry down therefrom all loose and overhanging rock and dirt before they started to work below. Failure to observe this rule, as Schmitt well knew, was taking the chance of being killed. The testimony shows that Schmitt warned the plaintiff Pedrin before they went down into the hole to work. Plaintiff cannot escape from the logic of the contention that the neglect to pry down the loose material was that of himself and his fellow servant, unless Green, the shift boss, is held to be a vice principal. And this brings us to the next point in our discussion.

FOURTH: THE SHIFT BOSS WAS A FELLOW SERVANT OF PLAINTIFF AND NOT A VICE PRINCIPAL OF DEFENDANT.

An examination of the cases reported in our law books shows that in well nigh every jurisdiction in

the United States the shift boss is held to be a fellow servant of those with whom he is working. The mere fact that he has authority over them, and directs them in the details of their work, that he is in some respects a superior servant, does not make him a vice principal. He is still a fellow servant as to all those duties which are not of such character as that the master cannot delegate them to his servants.

Whether one acts as a fellow servant or as the representative of the master is a question of law.

Callan vs. Bull, 113 Cal., 600, 603, 605;

Noyes vs. Wood, 102 Cal., 389, 393;

Donnelley vs. S. F. Bridge Co., 17 Cal., 417, 424;

Leishman vs. Union Iron Works, 148 Cal., 274, 282-283;

Daves vs. Southern Pac. Co., 98 Cal., 19-26;

Donovan vs. Ferries, 128 Cal., 48-54.

It is not the grade of service but the character of the act to be performed that determines whether a person is a vice principal or a fellow servant.

Daves vs. Southern Pac. Co., 98 Cal., 24;

Noyes vs. Wood, 102 Cal., 389, 392;

Callan vs. Bull, 113 Cal., 600, 601;

Donnelley vs. S. F. Bridge Co., 117 Cal., 423;

Skelton vs. Pacific Lumber Co., 140 Cal., 507-511;

Leishman vs. Union Iron Works, 148 Cal., 279.

To quote from *Callan vs. Bull, supra*:

"The liability of the appellant is to be determined by the character of the act through which the injury was sustained, or of his functions in reference to the act, and not by the rank or station of the employee under whose direction the act was performed. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its performance is his agent, and the master is responsible for the negligence. If, on the other hand, it is in an act which may be delegated to another, or may be performed by an employee, the person by whom it is performed is a fellow-servant with the other employees, irrespective of his rank, and the master is not responsible to them for his negligence in its performance. (*Daves vs. Southern Pac. Co.*, 98 Cal., 19; *Burns vs. Sennett*, 99 Cal., 363; *Noyes vs. Wood*, 102 Cal., 389; *Lindvall vs. Woods, supra*; *McGinty vs. Athol Reservoir Co.*, 155 Mass., 183). Whether one acts as a fellow-servant, or as a representative of the master, is a question of law (*Johnson vs. Boston Tow Boat Co.*, 135 Mass., 209; 46 Am. Rep., 458).

"The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall

be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation.

"The principle which controls in the present case is the same as that applicable in the construction of a house or other building, where the contractor agrees to furnish all the labor and materials requisite for its completion, and the carpenters, the plasterers, and the brick masons contribute their labor thereto. All of his employees are fellow-servants, and the preparation of the scaffold, ladders, staging, or other appliance for doing the different portions of the work, is within the scope of their employment."

And in *Daves vs. Southern Pac. Co.*, 98 Cal., 19, the Court says at page 26:

"It is not denied that Bresnahan was competent and experienced foreman, so that there was no neglect of duty by the master with respect to his selection. But the negligent act complained of was performed by him in the course of the work upon which they were all engaged, and by one who, so far as the particular act was concerned, was clearly not the agent of the master, but the fellow-servant of Daves. The place was therefore made dangerous by the culpable negligence of a fellow-servant, and this, notwithstanding the fact that his grade or rank at the time happened to be superior to that of Daves."

An illustrative case which considers the position of the shift boss, and holds him to be a fellow servant,

is *United Zinc Companies vs. Wright* (C. C. A.), 156 Fed., 571, where Adams, C. J., says:

“Defendant throughout the trial contended that Bruce, to whom plaintiff made the complaint and from whom it is claimed promise of reparation was received, was a fellow servant of plaintiff, and that, on familiar principles, his negligence, if any, in failing to secure better facilities for plaintiff to work with was imputable to plaintiff, and created no liability against the defendant. The evidence conclusively shows that Bruce was ground foreman in charge of men performing mining operations for defendant, and that there was a general superintendent who represented the master and who had general supervision over all work above and below the surface of the ground to whom the ground foreman reported and from whom he took directions. The duties and representative capacity of a ground foreman in mining operations conducted under the supervision of a general superintendent or manager have been frequently considered by the courts, and in a general sense the rule is firmly fixed that he is a fellow-servant with the gang of miners whose operations he is directing. *Alaska Mining Co. vs. Whelan*, 168 U. S., 86, 88, 18 Sup. Ct., 40, 42, L. Ed., 390, and cases cited; *Weeks vs. Scharer*, 111 Fed., 330, 334, 49 C. C. A., 372; *Id.*, 129, Fed., 333, 64 C. C. A., 11; *Davis vs. Trade Dollar Consol. Min. Co.*, 117 Fed., 122, 54 C. C. A., 636.”

Another case in point is *Heinze vs. Butte & Boston Consolidated Min. Co.*, 129 Fed., 333, 336:

“The shift boss and Scharer and Murcay were mere fellow servants of a common employer, unless the possession by the shift boss of the power

to temporarily suspend his co-workers raised him to a different class, and charged him with the positive duty of the master in respect of the competency of the employees.

"We are of the opinion that a shift boss who is without the power to discharge the workmen under him is not charged with the master's duty as to the exercise of care in the retention of none but competent servants, and is therefore not the master's representative in that respect, although he may possess the power of temporary suspension."

In *Weeks vs. Scharer*, 111 Fed., 330, Sanborn, C. J., carefully considers the rule and presents his conclusion as follows:

"One who enters the service of another assumes all the ordinary risks and dangers of that service. One of these risks is the danger of injury from the negligence of his fellow-servants. His association with his co-workmen is necessarily closer, his knowledge of their character, habits, and competence more intimate and more exact, than that of the master can be. As he has a better knowledge of their character and of their negligence, he is better able to protect himself against it than his master can be, and for this reason the law charges him with its risk. All who enter the employment of a common master to accomplish a common undertaking are *prime facie* fellow-servants, and each assumes the risk of the other's negligence. The duties of co-workmen engaged in a common undertaking are necessarily diverse, and their grades of service different. On some is imposed the duty of superintending the work, and directing their associates, when, where, and how to do it, while it falls to the lot of others to obey the directions of their superiors and to perform the labor.

But this difference of duties and grades of service neither abrogates nor affects the relation of fellow-servants. The foreman, the boss, or the superintendent of a gang of men is a fellow-servant of those under him to the same extent that they are co-workmen of each other. Each one of the subordinates assumes the risk of the negligence of his superior in the discharge of his duty of supervision and direction to the same extent that he assumes the danger of the carelessness of the servant who works by his side.

"To this general rule there is this exception: A servant is not, and a master is, liable for the negligence of a fellow-servant while he is engaged in discharging the personal duty of the master to use ordinary care to provide a reasonably safe place, reasonably safe tools and appliances, and reasonably competent servants. An employee frequently acts in a dual capacity,—at times a fellow-servant, at times a vice-principal,—and the line of demarkation between the negligence whose risk the servant assumes and that for which the master is liable is this: If the act is done in the discharge of a positive duty of the master, then negligence therein is the negligence of the latter. If it is done in the discharge of any other duty of the employee, it is the negligence of the servant, the risk of which his fellows have assumed.

"Some of the rules which we have thus briefly restated have been the subjects of volumes of debates and conflicting decisions, but they have at last become established beyond doubt or cavil by the repeated decisions of the highest Court in the land. *Railroad Co. vs. Baugh*, 149 U. S., 368, 13 Sup. Ct., 914, 37 L. Ed., 772; *Railroad Co. vs. Hambly*, 154 U. S., 349, 14 Sup. Ct., 983, 38 L. Ed., 1009; *Railroad Co. vs. Keegan*, 160 U. S., 259, 16 Sup. Ct., 269, 40 L. Ed., 418; *Railroad Co. vs.*

Peterson, 162 U. S., 346, 16 Sup. Ct., 843, 40 L. Ed., 994; *Railroad Co. vs. Charless*, 162 U. S., 359, 16 Sup. Ct., 848, 40 L. Ed., 999; *Railroad Co. vs. Conroy*, 175 U. S., 323, 20 Sup. Ct., 85, 44 L. Ed., 181; *City of Minneapolis vs. Lundin*, 58 Fed., 525, 527, 7 C. C. A., 344, 346, 19 U. S. App., 245, 249; *Coal Co. vs. Johnson*, 56 Fed., 810, 6 C. C. A., 148, 12 U. S. App., 490; *Railway Co. vs. Waters*, 70 Fed., 28, 16 C. C. A., 609, 36 U. S. App., 31; *Balch vs. Haas*, 73 Fed., 974, 979, 20 C. C. A., 151, 36 U. S. App., 693, 700; *Bridge Co. vs. Olsen* (C. C. A.), 108 Fed., 335, 337; *Railway Co. vs. Elliot*, 102 Fed., 96, 111, 42 C. C. A., 188; *Millsaps vs. Railway Co.*, 69 Miss., 423, 13 South., 837; *Railroad Co. vs. Hoover*, 79 Md., 253, 29 Atl., 994, 25 L. R. A., 710, 47 Am. St. Rep., 392; *Blessing vs. Railway Co.*, 77 Mo., 410; 2 Bailey, Pers. Inj., Secs. 2061, 2190; *Railroad Co. vs. Poirier*, 167 U. S., 48, 17 Sup. Ct., 741, 42 L. Ed., 72; *Oakes vs. Mase*, 165 U. S., 363, 17 Sup. Ct., 345, 41 L. Ed., 746; *Railroad Co. vs. Herbert*, 116 U. S., 642, 6 Sup. Ct., 590, 29 L. Ed., 755; *Randall vs. Railroad Co.*, 109 U. S., 478, 3 Sup. Ct., 322, 27 L. Ed., 1003; *Farwell vs. Railroad Co.*, 4 Metc. (Mass.), 49, 38 Am. Dec., 339; *Holden vs. Railroad Co.*, 129 Mass., 268; *Clifford vs. Railroad*, 141 Mass., 564, 6 N. E., 751; *Sherman vs. Railroad Co.*, 17 N. Y., 153; *Besel vs. Railroad Co.*, 70 N. Y., 173; *De Forest vs. Jewett*, 88 N. Y., 264; *Wager vs. Railroad Co.*, 55 Pa., 460; *Coal Co. vs. Jones*, 86 Pa., 432.

"It is an indisputable deduction from these rules that a superior servant charged with the duty of supervising the men under him and their work, but unauthorized to hire or to discharge them, is performing the duty of a fellow-servant, and not that of a master. His acts, his knowledge and his negligence are those of the servant, and not of the employer."

Other cases holding that the shift boss is but a fellow servant are as follows:

- Alaska Treadwell Gold Mining Co. vs. Whelan*, 168 U. S., 186; 42 Law Ed., 390;
B. & O. Ry. Co. vs. Baugh, 149 U. S., 772;
Russell Creek Coal Co. vs. Wells, 96 Va., 416;
 31 S. E., 614;
What Cheer Coal Co. vs. Johnson, 6 C. C. A.,
 148; 12 U. S. App., 490; 56 Fed., 810;
Stephens vs. Doe, 73 Cal., 26;
Wilson vs. Dunreath Red Stone Quarry Co.,
 77 Iowa, 429; 42 N. W., 360;
McCool vs. Lucas Coal Co., 150 Pa., 638; 24
 Atl., 350;
Hughes vs. Oregon Improvement Co., 20
 Wash., 294; 55 Pac., 119;
Petaja vs. Aurora Iron Co., 106 Mich., 463-
 469; 32 L. R. A., 435;
Deserant vs. Cerillos Coal R. Co., 9 N. M.,
 495; 55 Pac., 290.
Davis vs. Trade Dollar Consol. Min. Co., 117 Fed.,
 122; 54 C. C. A., 636.

It will be seen from an examination of the cases that, as is said by Judge Thompson in his work on *Negligence*, section 4923,

“It must be carefully borne in mind that the comparative grade or rank of the servant inflicting the injury and of the servant receiving the injury

is not the controlling test by which to determine whether or not the master is liable, but it is the *character of the negligent act or omission*; so that when a servant of whatever grade or rank in the service, even the lowest, is charged by the master with the performance of duties in favor of his other servants which the law requires the master to perform, to the end of promoting their safety, and such servant, while in the performance of those duties, inflicts a negligent injury upon another servant, the master will be answerable in damages for it on the ground that the servant inflicting the injury is his vice-principal, and not a fellow servant with the one receiving the injury."

And on this point Judge Thompson cites a great variety of cases.

Had the shift boss been charged with a primary or absolute duty of the master he would, of course, have been a vice-principal. But the long line of authorities referred to under the second division of this argument show that this particular duty, namely, keeping the glory hole safe as the work went on, is not a primary one, and is, in fact, not at all the duty of the master, so that in the performance thereof the shift boss was doing just what each of the other servants was supposed to do for his own good and for his own protection.

Turning, however, to the assignments of error we find by examining specification VI that a totally different rule is enunciated by the trial Court; that the Judge instructed the jury that it was essential the servant should be at the time directly co-operating in the

particular business in hand, or that their duties shall bring them into *habitual association*. And, as is shown by specification VIII the judge lays down an utterly untenable rule that where the person who gives the order, or does the act, a breach of which by the master in person has created a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority, the master is responsible. And the Court goes on to emphasize that if "he is clothed with apparent authority to direct and command" he is not a fellow servant. And in specification IX the Court squarely places itself in direct opposition to all of the decisions given under the second division and under this heading of authorities, and makes the master absolutely responsible for the neglect of the shift boss. The instruction is as follows:

"The rule of law known as the fellow-servant rule has no application to this case unless you find that the plaintiff was injured through the negligence of a fellow-workman NOT IN AUTHORITY over him. If you find that there was negligence on the part of another employee of the company and the negligent person had charge of the work in the glory hole and control over the men working there, he was not a fellow-servant but what is known in law as a vice-principal. Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate. The duty of providing a safe place to work cannot be shifted by the master and the agent represent-

ing the master in the premises must perform that duty, and if he fails through negligence, the negligence is that of the master."

That we may not unnecessarily lengthen this brief we desire to respectfully call the attention of this Honorable Court to the authorities cited in 4 *Thompson on Negligence*, Second Edition, under section 4923.

See in Labatt, in his work on master and servant, First Edition, section 550, that the test which determines whether the servant is or is not a vice-principal is the character of the act, and not the authority of the servant. There is subjoined to this section a table of cases arranged according to the States, which, while not pretending to be exhaustive, is one of the most complete which has come to our attention, and we desire to call the attention of this Court particularly to the Federal decisions therein cited.

Unquestionably in charging the jury that the master is liable for the negligent act of any servant in authority the trial Court committed reversible error.

FIFTH: THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN THAT HE FAILED TO INSPECT THE BANKS SURROUNDING THE GLORY HOLE BEFORE HE TOOK UP HIS WORK THEREIN.

With respect to this point we have shown that the record discloses the fact that Pedrin did not inspect the sides of the bank before descending into the glory

hole. The record also shows that he understood, and he testified clearly to the rule existing in all mines, a rule of safe mining, that a workman should inspect the sides of the hole before entering it. As we have shown above plaintiff conceded, by failing to deny the affirmative defenses set out in the answer that he was guilty of contributory negligence, but apart from this concession it is clear that where the duty of inspection rested upon himself and his fellow servants he was guilty of contributory negligence in failing to inspect.

Browne vs. King, 40 C. C. A., 545; 100 Fed., 561;
Anderson vs. Mining Co., 50 Pac., 815.

SIXTH: THE ASSURANCE GIVEN BY THE SHIFT BOSS THAT THE BANKS WERE SAFE WAS SIMPLY THE NEGLIGENT ACT OF A FELLOW SERVANT FOR WHICH DEFENDANT WAS NOT RESPONSIBLE.

Martin vs. Atchison, T. & S. F. Ry. Co., 166 U. S., 399; 41 Law Ed., 1051;
Balch vs. Haas, 20 C. C. A., 151; 36 U. S. App., 693; 73 Fed., 974;
McGowan vs. St. Louis I. M. R. Co., 61 Mo., 528;
Schott vs. Onondaga County Savings Bank, 49 App. Div., 503; 63 N. Y. S., 631;

Vitto vs. Keogan, 15 App. Div. (N. Y.), 329;
 44 N. Y. S., 1;
Stevens vs. Chamberlain, 40 C. C. A., 421; 100
 Fed., 378.

SEVENTH: THE DANGER INCIDENT TO THE BLASTING
 AND REMOVAL OF THE BANKS OF THE GLORY HOLE WAS
 ONE OF THE RISKS INCIDENT TO HIS EMPLOYMENT
 WHICH WAS ASSUMED BY THE PLAINTIFF.

American Bridge Co. vs. Vallente, 7 Penn.
 (Del.), 370; 73 Atl., 400;
Finlayson vs. Utica Mine & Mill Co., 14 C. C.
 A., 492; 32 U. S. App., 143; 67 Fed., 507;
Gulf C. & S. F. R. Co. vs. Jackson, 12 C. C. A.,
 507; 27 U. S. App., 519; 65 Fed., 48;
Clark vs. Liston, 54 Ill. App., 578;
Chicago Edison Co. vs. Davis, 93 Ill. App.,
 284;
Smith vs. Sellars, 40 La. Ann., 527; 4 So., 333;
Foley vs. Brooklyn Gas Light Co., 9 App.
 Div., 91; 41 N. Y. S., 66;
Cook vs. Bell, 20 Sc. Sess. Cas., 2nd Series, 137;
Muddy Valley Mining & Mfg. Co. vs. Parrish,
 74 Ill. App., 559;
Kletschka vs. Minneapolis & St. L. R. Co., 80
 Minn., 238; 83 N. W., 133;
Bradley vs. Chicago, M. & St. P. R. Co., 138
 Mo., 293; 39 S. W., 763;
Allen vs. Logan City, 10 Utah, 279;

- Griffin vs. Ohio & M. R. Co.*, 123 Ind., 326;
 24 N. E., 888;
Swanson vs. Lafayette, 134 Ind., 625; 33 N. E.,
 1033;
Aldridge vs. Midland Blast Furnace Co., 78
 Mo., 559;
Carlson vs. Sioux Falls Water Co., 8 S. D., 47;
 65 N. W., 419;
Missouri, K. & T. R. Co. vs. Spellman, 34
 S. W., 298;
Swanson vs. Great Northern R. Co., 68 Minn.,
 184; 70 N. W., 978.

“The servant assumes risks resulting from conditions for which he himself is responsible.” 1st *Labatt, Master and Servant*, section 256.

“A second proposition which is also beyond the reach of controversy is that every risk which an employment still involves when a master has done everything that he is bound to do for the purpose of securing the safety of his servants, is assumed, as a matter of law, by each of those servants.” 1st *Labatt, Master and Servant*, section 3.

These principles are also announced and illustrated in the following:

- Thompson vs. California Construction Co.*, 148
 Cal., 35;
 4 *Thompson on Negligence*, sections 4608, 4613,
 4616, 4647;
Fries vs. American, etc. Co., 141 Cal., 610, 614;

Killelea vs. Cal. Horseshoe Co., 140 Cal., 602;
Corletti vs. Southern Pacific Co., 136 Cal., 642;
Hanley vs. Cal. Bridge Co., 127 Cal., 232;
Limberg vs. Gleenwood L. Co., 127 Cal., 598;
Foley vs. Cal. Horseshoe Co., 115 Cal., 184,
 190;
Beeson vs. Green Mt. G. M. Co., 57 Cal., 20;
Sowden vs. Idaho Q. M. Co., 55 Cal., 443.

In view of the foregoing authorities it seems to us not to be denied that the trial Court took an entirely incorrect view of both evidence and law.

Specification II shows that on the motion for a non-suit the learned Judge's attention was directed to the most essential elements of the case: the assumption of risk by plaintiff; his self-evident failure to inspect the walls before starting work in the ditch; the utter absence of evidence that the shift boss was a vice-principal; the direct and uncontradicted showing that this shift boss was, at least as far as the work that was in progress was concerned, a fellow servant of plaintiff; and, finally, the absence of any showing that defendant failed in the discharge of its duty toward plaintiff or was negligent in any respect.

The showing made clearly entitled defendant to a non-suit. That it was denied is probably due to a misconception of the rules of law applicable to the case. It is clear that the Court felt an employer could not assign to another the duty of providing a safe place to work. The well established principle that the mas-

ter need not keep a place, originally safe, free from the ordinary dangers incident to the progress of the work was disregarded. And in its instructions the Court rejected the rule in its entirety. Specification 9 points out one charge based on the erroneous theory that at all times the duty of providing the safe place was primary and non-delegable. But the evidence shows no lack of safety in place or otherwise when the work was commenced by the night shift, and only a danger of later development due to the progress of this shift's labors. Giving full force to plaintiff's evidence the shift boss was negligent; but the Court was mistaken in charging that he was a vice-principal merely because he was "clothed with apparent authority to direct and command" (Specification 8), and still deeper in error was the learned Court when the jury was told that the fellow-servant rule has no application where the negligence is that of one in authority (Specification 9).

We have shown above that the test of vice-principalship is the *character of the act* and not the *superiority of the servant*. Were it otherwise the complete organization of a plant would be impossible without the practical elimination of the fellow-servant doctrine. Long ago it was settled that minor details of the work could be entrusted to one of a group of fellow-workmen who would see that the work was kept going, giving the minor directions necessary to achieve the end. And this placing of one man in authority over

his fellows has, as we have shown, not made him a vice-principal save in as far as the duties entrusted to him fell within the category of the primary, non-delegable obligations of the master.

The various instructions submitted by defendant but rejected by the Court stated, as we believe, the correct rules of law and would have necessitated a verdict for defendant.

We respectfully submit in view of the foregoing that the judgment herein, and the order denying a motion for a new trial should be reversed.

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No. 2360

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE BEATSON COPPER COMPANY,
a Corporation,

Plaintiff in Error,

vs.

JOHN PEDRIN,

Defendant in Error.

**Petition for Rehearing on Behalf of
Plaintiff in Error.**

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THE JAMES H. BARRY CO.

F. D. Monticlon,

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE BEATSON COPPER COM- PANY (a Corporation), vs. JOHN PEDRIN,	<i>Plaintiff in Error,</i> <i>Defendant in Error.</i>	} No. 2360.

PETITION FOR REHEARING ON BEHALF
OF PLAINTIFF IN ERROR.

Plaintiff in error respectfully petitions this Honorable Court for a rehearing, believing that thereby substantial justice will be done in this cause.

The points to which counsel upon both sides have chiefly directed their attention upon this appeal, involved the giving and refusal to give certain instructions. We believe that in our brief and arguments we have conclusively demonstrated that the trial Court erred in instructing the jury herein. In their argument before this Honorable Court counsel for the defendant in error failed to answer any of our contentions to the effect that said instructions were erroneous. No objection was made by defendant in error to the

manner in which exceptions were taken by plaintiff in error to the giving and refusal to give certain instructions to the jury. In fact, far from objecting to the plaintiff's manner of taking and preserving its exceptions, it affirmatively appears from the record that defendant in error consented to the manner in which the exceptions were taken. Nevertheless this Honorable Court has declined to consider the errors complained of for the reason that the exceptions were not stated while the jury were at the bar.

We respectfully urge that the rule referred to in the opinion of this Honorable Court should not be invoked in all of its strictness in the present case. And this for two reasons. The first is that both parties litigant have solemnly covenanted that this procedure may be followed. Certainly where both litigants have agreed to waive a rule of law, they should be bound by their waiver, when the matter is heard on appeal. Were it not for this stipulation of defendant in error the formality of excepting in explicit terms to the charge of the Court, or its refusal to charge as requested, would have been observed by counsel for plaintiff in error. It does not appear to be just or right that this stipulation should be disregarded and a judgment affirmed, despite the substantial errors which are practically admitted by our opponents.

A further reason why this harsh rule should not be applied is apparent from an inspection of the entire record. When we consider the reason underlying

the rule of law it is evident that exceptions are to be taken while the jury is at the bar, so that the trial Judge may have an opportunity to reconsider and correct his instructions. Manifestly the idea is that counsel should point out the Judge's error and by so doing prevent mistake.

In the cause now before Your Honors, the attention of the trial Court was, as we believe, sufficiently directed to the very points involved in the erroneous instructions of which we complain. The first affirmative defense interposed in defendant's answer, the motion for a nonsuit, and the motion for directed verdict, all presented these matters to the trial Judge. It may be true, as is said in the opinion of this Honorable Court, that this cause is one which should properly have been submitted to the jury under suitable instructions. But the record shows that the matters upon which the law was improperly stated by the trial Judge were so forcefully brought to his mind during the trial of the cause that formal exception to the particular instructions in the presence of the jury would have been but an idle act.

In addition to this the instructions requested by plaintiff in error, and refused by the trial Court, clearly indicated to the trial Court the erroneous character of the instructions he elected to give.

We submit that the judgment heretofore rendered herein should be set aside and a rehearing granted, for the reason that the instructions given by the trial Judge

were erroneous, that the rule requiring exceptions to be taken while the jury is at the bar was expressly waived by plaintiff below, and for the further reason that in this case the reason for the rule ceases to exist since the attention of the trial Court was explicitly drawn to these errors during the entire conduct of the case.

Respectfully submitted.

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Attorneys for Plaintiff in Error.

No. 2360

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE BEATSON COPPER COMPANY,
a Corporation,

Plaintiff in Error

VS.

JOHN PEDRIN,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR

E. E. Ritchie

E. E. RITCHIE,
Attorney for Defendant in Error.

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THE BEATSON COPPER COMPANY, a corporation,	} No. 2360
<i>Plaintiff in Error</i>	
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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

In this brief the parties will be referred to as in the trial court, defendant in error as plaintiff, and plaintiff in error as defendant.

The statement of the case in defendant's brief is so inaccurate as to be misleading, and plaintiff presents the following as absolutely accurate in every detail mentioned:

Plaintiff sued to recover damages for personal injuries received by him while working in a mine owned

and operated by defendant. When injured he was working on the night shift in a pit or "glory hole," his task being that of "bulldozing," or breaking large rocks with powder at the bottom of the glory hole. At the same time drillers were drilling and loading holes with dynamite for the purpose of breaking down ore. While most of them on shift, including plaintiff, were at lunch about midnight the dynamite charges in the wall were fired. Colloquially this is known as firing shots.

After lunch plaintiff and John Schmitt, another "mucker," who had been working with him, returned to the ground adjoining the glory hole and were immediately ordered by Green, the shift boss, to go down quickly into the hole and bulldoze the large rocks broken down by the shot. Testimony was offered showing that Schmitt wanted to examine the walls to ascertain their condition, as is usual after firing a shot, but the foreman said the wall was solid and he wanted the men to hurry and get some ore ready to load cars. Plaintiff was sent to the powder house for powder, although that was a duty for which a man, known as the "powder monkey," was employed, and when he returned with the powder he and Schmitt went to work at the bottom of the glory hole, plaintiff placing the dynamite for bulldozing and Schmitt holding a small lantern, the only light they had to work by. (R. 104-5-6.) Soon afterward, while plaintiff was on his knees

at work, a slide of rock and earth came down from the wall, almost burying him and causing the injuries complained of.

Plaintiff pleaded that he was without fault; that he had exercised all the care that could be expected of him; that it was the duty of the company to assure the safety of the glory hole so far as reasonable precautions could do so; that this was the duty of the foreman in charge of the work; that it is a rule of safe mining everywhere that the foreman in charge shall examine the wall after a "shot" has been fired in it and have all loosened fragments detached before proceeding with other work in the place; that in this case the foreman failed and neglected to do this, a fact of which plaintiff had no knowledge and no means of knowledge in the ordinary course of his employment; that the accident was wholly due to this negligence of the employer.

The defendant answered, denying any negligence on its own part and pleading assumption of risk and negligence of "plaintiff himself, and or by the negligence of a fellow servant." At the trial defendant offered no evidence except that of its surgeon as to plaintiff's injuries and their consequences.

Defendant's statement of the case is inaccurate in the following particulars: Plaintiff did not begin work on November 12, 1912, and work in the glory hole through November, December and January fol-

lowing. He began work about December 1, worked irregularly around the mine proper and its environs. He had been working steadily only two weeks when injured, on January 25, 1913. His work is thus described by himself and not contradicted:

"I was mucking and shoveling the snow—shoveling the cars and cleaning the track and bridge there. I worked sometimes in that glory hole,—any place they put me to work." (R. 23.)

Similar statements were made by plaintiff on cross-examination. (R. 40-41.)

No evidence was offered to show, as stated in defendant's brief, that "It was the duty of plaintiff, his shift-boss and Schmitt, to pry away loose and overhanging rock." The uncontradicted testimony of plaintiff's witnesses was that the duty of insuring the safety of the walls as far as possible was incumbent upon the company's agent in charge of the work. Defendant offered no testimony on this point.

Defendant's brief is inaccurate in stating that on the night of the accident "Pedrin, Schmitt and Green, the shift-boss, together with a couple of drillers, were working enlarging this glory hole and taking away the rock." Green was not working there except to give occasional orders from outside the glory hole. He was in charge of all the operations on the shift, which included work in other parts of the mine and outside of it.

Defendant's statement is inaccurate in averring that

before going into the glory hole Schmitt made some inspection and discovered an unsafe condition. Schmitt testified that when he returned to work after lunch he took a pinch bar and started to examine the wall where the shot was fired and was stopped by Green, who assured him the wall was solid. (R. 91-92-103-4-5-6.)

The jury returned a verdict for plaintiff, upon which judgment was entered, and defendant sued out a writ of error, assigning thirty-four errors. The first two are abandoned in the brief. In argument counsel for defendant set up and urge seven contentions.

First. Defendant in its answer to plaintiff's complaint pleaded affirmatively assumption of risk, contributory negligence and negligence of a fellow-servant. No reply was filed and it is argued that defendant was entitled to judgment on the pleadings. Carter's Alaska Code is cited:

"Sec. 901. If the answer contain a statement of new matter, constituting a defense or counter-claim, and the plaintiff fail to reply or demur thereto, the defendant may move the court for such judgment as he is entitled to on the pleadings," etc.

The answer to this contention is simple. Defendant did not set up any new matter. Part of its answer was labeled "affirmative defense," but this affirmative defense only contained allegations which amounted to denials of averments of the complaint. Plaintiff in Paragraph IV of his complaint explicitly averred that

it was the duty of the defendant corporation, through its representative in charge of the work, to provide a reasonably safe place to work; that this duty was wilfully neglected, and the neglect was the direct and proximate cause of plaintiff's injuries. These allegations negative the pleas of assumption of risk and negligence of a fellow-servant. In the same paragraph plaintiff avers that he did not know and had no means of knowing in the ordinary course of his employment that the wall had become unsafe. This negatives the defense of contributory negligence. By direct and distinct averments plaintiff had anticipated all possible defenses and a reply negating these defenses a second time would have been a mere repetition. The issues were already clearly defined and no new one was raised by the answer. Perusal of Paragraph IV of the complaint disposes of defendant's contention. It is as follows:

"Plaintiff alleges that while working on the shift in said mine as hereinbefore recited he was under the immediate direction and orders of one Green, whose first name is to plaintiff unknown, who was then and there shift boss or foreman of said work and vice-principal of defendant corporation, and it was the duty of said foreman acting for defendant corporation to provide a reasonably safe place to work for the men under his direction by taking all reasonable precautions for their protection, and in discharge of such duty it was incumbent upon him to see and provide that after a shot was fired in the wall of said glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning become detached. Plaintiff alleges that said foreman and vice-principal wilfully and negligently and

recklessly failed to discharge said duty in this instance, and that his said wrongful neglect was the direct and proximate cause of plaintiff's said injuries. Plaintiff alleges that when he went to work on the night shift as aforesaid the said glory hole was very dark and it was necessary to perform his said work of bulldozing by the light of a lantern which was held for him by another man; that he had no knowledge of the unsafe condition of said wall and no means of knowledge in the ordinary course of his employment; that when he returned to work in said glory hole after dinner at about 12:30 A. M. as aforesaid he had no knowledge of the fact that the wall above his place of work was in a dangerous condition, and had no means in the ordinary course of his employment of acquiring knowledge of that fact; that he was ordered by said foreman to resume immediately his work of bulldozing at the bottom of the glory hole and was so engaged and was working by the light of a lantern held by a co-employee, named John Schmitt, and commonly called 'Russian John,' when the mass of rock and earth fell upon him from said wall as hereinbefore described."

In paragraph II of the complaint plaintiff alleges:

"It is a rule absolutely required by safe mining, and usually followed at defendant's mine, after a 'shot' is fired to make a careful examination of adjacent walls from which fragments might fall upon men working near, and to 'bar down' or pry loose with crowbars all loosened portions of the wall. These precautions for insuring a safe place for miners and laborers to work are recognized rules of careful and safe mining and constitute a duty devolving upon the mine operator and his vice-principal, the foreman or the shift boss directing the work."

Counsel for defendant cite several cases in support of their contention. Examination of these cases shows that in most of them the answer did contain new matter, calling for evidence that could not have been intro-

duced under a general denial. In *Benecia etc. v. Creighton*, 30 P. 676, the defendant, sued on a note, pleaded partial want of consideration and settlement in full, reciting the terms of the alleged settlement. In *Haines v. Connell*, 87 P. 265, plaintiff sued to quiet title against a sheriff's deed founded on an attachment proceeding. Defendants pleaded facts showing a purchase in good faith before plaintiff's deed was filed for record. In *Babcock v. Bank*, 26 P. 1037, defendant was sued on a note and pleaded that he had paid enough usurious interest to extinguish the note. In *Minard v. McBee*, 29 Or. 225, 44 P. 491, plaintiff sued on a note and admitted several payments. Defendant answered, alleging payments not credited. Clearly, this was new matter, introducing a new issue. In *Thomson v. Allen*, 1 Alaska 636, plaintiff sued to quiet title and defendant set up in her answer a superior title, founded on a location of a mining claim, alleging all the facts concerning the location, clearly an affirmative defense.

None of the cases cited is similar to the one at bar except *L. & N. R. Co. v. Paynter* (Ky.) 82 S. W. 412. Two justices dissented from the decision and it is at variance with the weight of authority. Outside of Kentucky hardly anything supporting it can be found. Some of the cases cited do not touch the contention. For example, the *Hathaway* case in 99 Fed.

The real test of new matter in an answer is, does

it introduce an issue wholly new? If the issues are fairly made up by a liberal construction of the complaint and answer no issue can be added by a reply. The whole office of pleadings is to make up issues. Carter's Alaska Code provides:

"Sec. 75. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties."

In *Bowles v. Doble*, 11 Or. 480, the court said:

"A motion for judgment on the pleadings is not in harmony with the spirit of the Code, and as a consequence such a motion ought not to be favored."

In *Currie v. S. P. Co.*, 23 Or. 400, the foregoing exposition of the law is quoted and approved.

An Oregon case in the federal court, *Watkins v. S. P. Co.*, 38 Fed. 711, construing the code provision in question, is decisive because on the identical point. The court said:

"The answer also contains a statement erroneously styled 'a further and separate defense,' in which it is alleged that the defendant used due care and diligence in the matter complained of, and that the alleged injury to the plaintiff was not caused by any negligence on the part of the defendant, but was wholly owing to the negligence and fault of the plaintiff himself."

"No reply having been filed to this so-called 'defense,' the defendant moves the court for 'judgment against the plaintiff on the pleadings, and for want of a reply.'"

* * * * *

"The statute in authorizing a judgment on the plead-

ings in case no reply is made to a defense, presupposes that the facts constituting such defense are not elsewhere stated or put in issue in the pleadings; in short, that they are 'new matter.'

"Admitting, then, for the sake of argument, that the defense of contributory negligence is well pleaded, and uncontroverted by a reply, still the same matter is put at issue by an allegation of the complaint, and a denial of the answer.

"The court cannot give judgment for the defendant on the pleadings, unless, when taken as a whole, the fact or facts necessary to the support of such a judgment are thereby admitted.

"True the defendant contends that the fact of contributory negligence, as alleged in this defense, is admitted, because no reply has been filed thereto. But the plaintiff had already alleged that he was not guilty of contributory negligence, and the defendant, by denying the same, took issue with him thereon. An issue having been reached on this question between an allegation of the complaint and a denial of the answer, there is no necessity for any further pleading thereabout.

"I know it may be said that this allegation, not being necessary to the statement of plaintiff's case, is immaterial, and the issue taken upon it is so likewise. But it anticipates and controverts a possible defense to the action; and the defendant having accepted the controversy in this form by taking issue on the allegation, I do not think it can be heard to say the issue is an immaterial one, and ought on this motion to be disregarded.

"But this defense is not a good plea of contributory negligence, and is nothing more than another 'denial' of the plaintiff's allegation that the injury was not caused by any fault or negligence on his part."

This cogent statement covers every phase of defendant's alleged 'affirmative defenses' in this case. These defenses are so stated as to constitute merely cumula-

tive denials of the allegations of the complaint, all of which allegations touching the facts and circumstances of plaintiff's injury had already been denied by the answer. The plea of assumption of risk "incident to the employment," as it is stated, is nothing more than a denial that defendant was at fault. Under the Oregon rule it is unnecessary for a defendant to plead assumption of ordinary risks by an employe, because the law imposes that liability upon him. Hence such a plea is immaterial.

"The answer need not allege that he assumed the risk that caused his injury, if the hazard was ordinary." *Tucker v. N. P. R. Co.*, 41 Or. 42, 68 P. 426.

The plea that plaintiff was injured through the negligence of a fellow-servant can be taken as nothing more than a denial of the allegation that Foreman Green was in charge of the work and was a vice-principal, charged with a non-delegable duty, since if it was intended to plead the negligence of any other employe the facts should have been distinctly alleged so that plaintiff could meet them. If this was not done there was no affirmative defense. Finally, if contributory negligence was intended to be pleaded the facts constituting the negligence should have been set out. *Bailey on Personal Injuries*, Vol. III, Sec. 853.

If it be contended that the statement of these "affirmative defenses" should have been demurred to for insufficiency the answer is found in the provision of

sec. 62 of Carter's Alaska Code of Civil Procedure, that the objection that a pleading does not state facts sufficient to make it a good cause of action or defense is never waived. It may be raised at any time. It was not necessary to take any notice of an answer which amounted to no more than a denial of plaintiff's cause of action, since issue was thereby joined on the complaint and called for trial.

"New matter constituting a defense must be complete in itself, and must contain all that is necessary to answer the whole cause of action, or that part of it to which it is addressed." *Gardner v. McWilliams*, 42 Or. 17.

"We cannot presume that, if the facts relied upon to sustain this plea had been stated, plaintiff would not have met them with rebutting testimony. It is the plaintiff's right to know the facts, and to have an opportunity to meet them." *Johnson v. L. & N. R. Co.*, 16 So. 75.

Defendant's "affirmative defenses" stated no probative facts but only legal conclusions.

The issues were clearly made up by the pleadings, so that neither party could be misled, and if there were any defects in the pleadings they were cured by the verdict. The general rule is thus stated:

"Though there is a defect, imperfection, or omission in the pleadings, yet if the issue joined is such as necessarily required on trial proof of the fact so defectively or imperfectly stated or omitted, and without which it is not to be presumed that the jury would have rendered the verdict found, such defect, imperfection, or omission is, as it is expressed, cured by the ver-

dict." 22 Ency. of Pl. & Prac., 939, citing numerous cases.

Judge Moore in *Hannon v. Greenfield*, 36 Oregon 97; 58 Pac. Rep. 888-9, says:

"The rule is well settled in this state that a general verdict will cure a defective statement in a pleading, but will not aid one from which a material averment is omitted."

The other six contentions stated may be considered together because they all go to the issue of negligence in the case. These contentions are as follows:

"Second. The defendant was not charged with the duty of keeping the glory hole safe from dangers incident to the progress of the work since a master is not obliged to keep the place of work free from dangers incident to the progress of the work for which the employe is engaged.

"Third. Plaintiff and his fellow employes were charged with the duty of inspecting and keeping safe the glory hole in which they were working.

"Fourth. The shift boss was a fellow-servant of plaintiff and not a vice-principal of defendant.

"Fifth. The plaintiff was guilty of contributory negligence in that he failed to inspect the banks surrounding the glory hole, before he took up his work therein.

"Sixth. The assurance given by the shift boss that the banks were safe was simply the negligent act of a

fellow-servant for which defendant was not responsible.

"Seventh. The danger incident to the blasting and removal of the banks of the glory hole was one of the risks incident to his employment which was assumed by the plaintiff."

The second and third contentions together urge that plaintiff and his co-workers were charged with the duty of keeping the glory hole as safe as possible, because the master is not obliged to keep a place of work free from dangers incident to the progress of the work. The vice of this argument is that it assumes all dangers arising under any circumstances in the glory hole to have been "incident to the work." Plaintiff's claim is based upon the allegation that an unnecessary hazard was added by the employer's negligence and that this needless hazard was a breach of a non-delegable duty.

It is well to observe here that defendant offered no evidence in the trial except that of its surgeon as to the extent of the plaintiff's injuries. All evidence as to negligence, including testimony as to mining law and customs affecting the duty to keep the glory hole as safe as possible, was introduced by plaintiff, and defendant made no effort to break it down except by cross-examination of plaintiff's witnesses. Neither Mr. Green nor Superintendent Van Campen was produced as a witness. This raises a presumption against the defendant under an express provision of Carter's Alas-

ka Code, Sec. 673, sixth and seventh subdivisions:

"Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

Equally should the failure of a party to offer any testimony in support of positive denials and averments of its answer raise the presumption that it had none to offer. It cannot be seriously assumed that the skilful and experienced counsel who represented defendant in the trial held back witnesses who could have strengthened his case.

In a recent Wyoming case, *Owl Creek Coal Co. v. Goleb*, 210 Fed. 209, judgment for plaintiff was reversed solely because the trial judge refused to admit testimony offered by defendant to show almost precisely the facts pleaded by defendant herein. The case was so similar to the one at bar that argument in one almost fits the other. The negligence charged was that defendant "negligently permitted the place where plaintiff was working to become unsafe and dangerous," the fault being charged upon the pit boss, Kirby. Plaintiff was injured by the fall of coal upon him soon after "shooting" in the wall, having been ordered to work there by Kirby over his protest. The pleadings were almost identical on both sides with the plead-

ings herein. The appellate court held that defendant should have been allowed to show, as it offered to do, that plaintiff knew the conditions of the place, that the danger was obvious, that he had been warned of the danger, that he had made some test of the walls, that it was his duty to remove loose coal when the walls were plainly insecure. The trial court was sustained on all other points.

In the case at bar the chief issue was to locate the duty of inspecting the walls after a shot and removing loose fragments if found. Plaintiff introduced positive testimony placing that duty upon the employer. Defendant failed to offer any proof at all in contradiction.

It seems superfluous to argue the law governing the non-delegable duty of the employer to use reasonable care to make the place of work as safe as its nature and purposes permit. The rule is that he must eliminate needless hazards and if he fails to do this he is guilty of actionable negligence, whether the neglect is his own or that of an agent. See Labatt's Master and Servant, sec. 1483, 2d Ed.:

"The establishment of the above doctrine has undoubtedly been brought about by recognition of the fact that, unless the master's liability for the acts of a vice-principal were admitted, the rule that dangers caused by the master's negligence are not among those assumed by the servant would, in the great majority of cases, be rendered nugatory. The most satisfactory standpoint seems to be obtained by considering it to be an application of the general principle of jurisprudence, that anyone upon whom a duty of an absolute

quality is imposed must, at his peril, see that it is discharged in a reasonably careful manner, whether he undertakes its performance in person, or employs a deputy for that purpose. That is to say, the care which a master is bound to use, he exercise through another only at his own risk. 1 Beven. Negl. pp. 493 et seq.; Shearm. & Redf. Neg. secs. 14, 176; National Steel Co. v. Lowe, 127 Fed. 311."

The defect of the argument advanced by counsel for defendant is that it fails to recognize the distinction between risks inseparable from the progress of the work and those added to it needlessly by the agent directing the work. The argument for the employer in all such cases is that if the work of the employe had any part in making the accident possible, or if he might by any possibility have ascertained and avoided the danger, he is to be held responsible for his own mischance. Decisions can be cited which uphold, or seem to uphold this contention, but the drift of recent judicial decisions, as well as legislation, has overthrown all such authorities. Nearly all the courts follow the modern rule, which is explicitly laid down by the supreme court in *Kreigh v. Westinghouse*, 214 U. S., 249-256, as follows:

"Nevertheless, the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. As late as *Santa Fe & Pacific R. R. Co. v. Holmes*, 202 U. S. 438, it was declared: 'The duty is a continuing one and must be exercised whenever circumstances demand it.'

"Where workmen are engaged in a business, more

or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employes, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employe should be exposed to dangers unnecessary to the proper operation of the business of his employer. *Choctaw, Oklahoma etc. R. R. v. McDade*, 191 U. S. 64, 66 and cases there cited."

The rule is more tersely stated in *Santa Fe Pacific Railroad Company v. Holmes*, 202 U. S. 438, as follows:

"The duty of the master to furnish safe places for employes to work in and safe appliances to work with is a continuing one to be exercised wherever circumstances require it."

In this case it was the duty of the defendant, acting through whatever agent directed the work, to take reasonable precautions to keep the walls of the glory hole in such condition that they would not fall upon the men working in the pit. The contention that it was the duty of the men to inspect the wall for themselves under the circumstances is answered by *Mr. Labatt*, sec. 1013, in laying down among the continuous duties of the master the following:

"To refrain from giving orders which will require a servant to put himself in such a position that he will be subjected to the risk or injury from a defective instrumentality is a duty the breach of which is no less culpable than the breach of the analogous duty of abandoning the use of the defective instrumentality."

The evidence shows that Foreman Green hurried plaintiff and Schmitt into the glory hole without an inspection of the wall where a shot had just been fired. Schmitt testified that Green assured him the wall was solid and that there was no need of "barring down." Then plaintiff was sent after powder. (R. 92-105.) Green and Schmitt awaited his return. (R. 105.) He might naturally have assumed that in his absence Green had determined that the wall was safe. Another circumstance fixing responsibility upon the defendant, through its directing agent, to inspect the wall, and excusing plaintiff, is the darkness. It was a winter night and the men had only a small lantern to work by. (R. 28-76-77-110-1-2.)

The law governing liability in construction work, repair work or making a dangerous place safe is well settled. It is conceded that the ordinary hazards arising in any of those classes of work are assumed by the employe. It is as well settled that if the negligence of the employer adds an unnecessary risk he is liable for resulting injuries to the employe. In this, as in all similar cases, the question is solely the application of these conceded principles to the particular facts.

Counsel for defendant lift from the record into their brief considerable testimony of Pedrin, the plaintiff, and of "Russian John" Schmitt on the custom of barring down and what was done in this instance, but

cautiously omit the statements made by these two men concerning orders. On page 27 of the record Pedrin states:

"Q. Now, after they fire off a shot in that glory hole what do they usually do first?

"A. Well, they always give us orders what we have got to do, so that night he gave me orders to go and clear up that shaft and bulldoze that big rock that fell down."

Defendant's brief then gives the further testimony of Pedrin as to what "they" do. Clearly by "they" he means the authority giving orders and what the men do under those orders.

Defendant's brief stops quoting Pedrin's testimony when it comes to this:

"Q. When you came back, did anybody give you any orders?

"A. Yes, sir, Mr. Green gave me orders.

"Q. What did he tell you to do?

"A. He told me to go to that shaft 38, where there was a glory hole and bulldoze all them big rocks that fell down, that had been shot in there. (R. 27-8.)

Pedrin then told of Green's hurry-up order to get some ore ready for the chute leading to the cars. On page 512 his testimony states that when he returned from dinner, Green, who was standing at the side of the glory hole, told him first to resume bulldozing in the glory hole, then changed the order and sent him for powder first.

Defendant's brief, quoting freely from "Russian John's" testimony, overlooks this:

"Now when you went back to the glory hole after 12 o'clock did you get any orders? Yes.

"Q. From whom? A. Mr. Green.

"Q. What did he tell you to do?

"A. He told me, he say, 'John, leave alone that; I don't want to bar down; I want to draw from this chute.'

"Q. Do I understand that Mr. Green told you, you and John, to go and bulldoze those rocks at the bottom of the glory hole?

"A. Yes; he say, 'I want to bulldoze those rocks as quick as I can. John, go and get powder and bulldoze that rock,' and I said, 'No, I don't go after powder; I have no right powder-monkeying—the powder monkey gets his wages; I get mucker wages. I want to bar down before I go bulldozing.' He said." (R. 92.)

Defendant's brief then takes up the narrative as follows:

"'Nothing doing; this ground is solid.' I said 'By golly, I don't know; I have to try.'"

On page 106 Schmitt says:

"Green tells it was all right. He don't allow me to examine."

And on page 113, after repeating that Green stopped his examination of the wall, Schmitt says:

"Sure; he is the boss here or manager—I take the order you say and have to do by your order."

By skilful cross-examination counsel for defendant induced Pedrin and Schmitt to make various loose statements as to what miners usually do about barring down walls after a shot. By keeping away from the question of orders in this case and the testimony as

to its being the duty of the shift boss by rule everywhere to inspect the walls defendant's brief argues that the testimony shows the muckers to have been charged with that duty. Credit is due to counsel, however, for stating on page 65 of their brief the testimony of Gleason, who qualified as an expert miner of long experience. (R. 117.)

"Q. Where work is being done under the direction of a foreman or shift boss who looks after that?" (Referring to clearing walls after a shot.)

"A. Why, the foreman or shift boss who is in charge." (R. 119.)

The broken English of Pedrin and Schmitt and their frequent unresponsive answers to questions shows that they are illiterate men who did not fully understand many of the questions nor the exact purport of some of their own answers. While admitting freely that the miners or muckers do the work of barring down walls after a shot, they also said, whenever their attention was directed to the point, that the men do it under orders whenever they have a foreman. In this case they obeyed orders implicitly. The hurry-up orders of Green placed Pedrin in hazard of his life when five minutes' work or less would have removed the wholly needless risk, which Pedrin plainly did not comprehend, as there was ample time for Green to examine the walls while he was gone for powder. In any view of the case Green was culpable under the rule already cited from Labatt as to the duty

of the master to refrain from giving orders that place servants in peril.

That a wall of earth and rock nearly perpendicular is liable to cave, every person of slight intelligence knows. That it may stand for a long time is also well known. That a person of some experience with such walls can tell by a few minutes' examination whether there is imminent danger of its caving is equally true. Because of these incontestable facts failure of the agent representing the employer in this instance to ascertain the condition of the wall before sending men into the glory hole to work in the darkness was neglect of the non-delegable duty of the master to take reasonable precautions to make the place of work as safe as the nature of the work permitted. It was a duty so simple that neglect of it was gross negligence. Whether plaintiff was also negligent was a question of fact for the jury.

"If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work." *Grand Trunk R. R. Co. v. Cummings*, 106 U. S. 700; *Deserant v. Cerillos Coal Railroad Co.*, 178 U. S., 409, 420, and cases there cited.

The whole current of recent judicial decisions destroys the authority of the cases cited by defendant. Particularly is it held in nearly all courts, federal and state, that questions of negligence are for the jury

and not for the court. The rule is incisively stated by the supreme court in *Kreigh v. Westinghouse*, 214 U. S., 258, quoting from *Gardner v. Mich. Cent. Railroad*, 150 U. S., 349, 361:

"Questions of negligence do not become questions of law to be decided by the court except where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

It is needless to tabulate the long list of cases in which similar language has been used. The rule just stated is settled law. Equally needless is it to cite ruling cases often cited before in this court—some of them decided by this court—in which facts similar to the facts in the case at bar have been held to justify recovery by the plaintiff. The following new cases are in point on the related questions of assumed risk, negligence of employer and contributory negligence of employe:

"In an employe's action for injuries caused by sacks of cement falling on him from a pile from which shortly before he had taken several sacks, evidence held to make questions for the jury as to the employer's negligence in the manner of piling the sacks and in failing to inspect the pile to determine its safety, as to the employe's contributory negligence, and, if he was negligent, as to whether his negligence was slight in comparison with that of the employer." *Bolton-Pratt Co. v. Chester*, 210 Fed. 253, (Sixth Circuit.)

"In an action for injuries to a stonecutter, while attempting to cut a stone from a pile, by the fall of the pile, due to inherent weakness in the manner in which it was piled, together with the fact that other stones were leaned against the pile, evidence held to require submission of defendant's negligence and plaintiff's contributory negligence to the jury." *Schenkemeyer v. Tusek*, 210 Fed. 151. (Third Circuit.)

"In an action for injuries to an employe in a coal mine by the fall of a portion of the roof, evidence held to require submission to the jury of the question whether the firing of shots in certain pillars near where plaintiff was employed caused the roof to become unsafe and fall." *Victor-American Fuel Co. v. Peccarich*, 209 Fed. 568, (Eighth Circuit.)

"A master is bound to provide safe instrumentalities for his servants while at work, and the servant may absolutely rely on the performance of such duty." *Albert Miller & Co. v. Wilkins*, 209 Fed. 582, (Seventh Circuit.)

"In actions for negligent injury the questions of the negligence of the defendant and contributory negligence of plaintiff are ordinarily questions for the jury, and courts will not interfere to declare either the one or the other as matter of law, where there is no fixed standard by which the alleged negligence may be determined, or unless there is such an obvious disregard of duty as amounts to misconduct. The question is always one for the jury when the measure of duty is ordinary and reasonable care." *Bush v. Hunt*, 209 Fed. 164, (Third Circuit.)

The cause of the accident in the case last cited was a defective elevator. Plaintiff knew the elevator worked badly and was also charged with contributory negligence at the time.

Carstens Packing Co. v. Godo, recently decided in

the Ninth circuit, held the alleged negligence a question for the jury. (208 Fed. 8.)

"To establish the defense of assumed risk or of contributory negligence as a matter of law, in an action to recover for the death of an employe of defendant, it must be shown without substantial conflict either that deceased knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it, or that his acts were such that fairminded men could not draw different conclusions therefrom touching the existence of neglect on his part directly contributing to his injury.

"On a motion for directed verdict, the court must take that view of the evidence most favorable to the adverse party." *Tennessee Copper Co. v. Gaddy*, 207 Fed., 297, (Sixth Circuit.)

In the last case plaintiff was killed by a fall of rock from a higher stope in a mine.

Pacific Telephone & Telegraph Co. v. Starr, 206 Fed. 157, recently decided in the Ninth circuit, plaintiff having been hurt by a defect in a ladder, held the issues of negligence and assumption of risk to be questions for the jury.

"Plaintiff was employed in defendant's store. On the second floor there was a toilet room which she was accustomed to use and which was entered by two steps upward from the floor and through a door. The floor in this room had been taken out in making repairs, but plaintiff had not been notified and did not know it, and as she stepped through the door she fell a distance of ten feet and was injured. The door was not fastened, but there was a large card upon it with a notice that the place was closed for repairs. Plaintiff testified that she did not see the notice; that she was looking down; that the approach was through

a narrow space between two 'showcases' which was also encumbered to some extent by boxes.

"Held that the evidence was not so clear as to warrant the court in directing a verdict on the ground that she was guilty of contributory negligence as a matter of law, but that the question was one for the jury." *McLaughlin v. Joseph Horne Co.*, 206 Fed. 246, (Third Circuit.)

"Where it was customary in a quarry for the foreman to inspect missed shots before reloading them, a laborer directed to reload a missed shot did not assume the risk of injury from an explosion while engaged in his work of reloading, owing to unextinguished fire in the hole." *Taylor v. Atchison Gravel Co.*, 135 P. 576.

To reiterate, plaintiff's injury was caused by an added risk needlessly created by defendant. If plaintiff had been ordered by Green to examine the wall and bar down if necessary the risk would have been an ordinary one, but when Green ordered him to the bottom after time enough had elapsed in his absence for Green to inspect the wall and have it cleared he had a right to assume that the reasonable safety of the wall had been assured by Green, who was charged with that duty according to all the testimony offered on that point.

"It is manifest that a servant cannot be deemed to have been in fault for the reason that he failed to take precaution which he did not know to be necessary for his safety." *Labatt*, sec. 1233, 2d Ed, citing many cases.

"In determining whether an employe has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies

of his position, indeed to all the circumstances of the particular occasion." *Kane v. Northern C. R. Co.*, 128 U. S. 91.

Labatt's Master and Servant, in Chapter LV1, devoted to the title "Right of action for injuries received in obeying orders," in sec. 1357, lays down the following rule:

"As a condition precedent to establishing his right to recover for an injury on the ground that it resulted from his compliance with a specific and direct order, the servant must establish the following propositions:

- (1) That an order was given.
- (2) That the order, if not given by the master himself, was given by his representative, within the scope of the authority conferred on him.
- (3) That the act which led to the injury was done in obedience to the order.
- (4) That the order was a negligent one under the circumstances."

Under this statement the author cites a long list of cases, from which the following are selected as typical:

"A servant does not stand on the same footing as his master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in this respect, and, therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders, without being chargeable with contributory negligence." *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45, 24 N. W. 311.

"The servant has a right to rest upon the assurance that there is no danger, which is implied by such

an order." Ill. Steel Co. v. Schymanowski, 162 Ill. 459, 44 N. E. 876.

"Where the personal negligence of the master has directly caused the injury, there the master's liability to the servant is the same as it would be to one not a servant." Whart. Neg. sec. 205.

In such case the fellow servant rule is not a factor.

Further authorities seem superfluous on the question of negligence in this case.

The fifth and seventh contentions of defendant's brief urge contributory negligence and assumption of risk and are fully answered in discussing the second and third. The fourth and sixth urge that the negligence was that of a fellow-servant.

Extended argument on this point is needless because of a statement of the law in defendant's brief with which plaintiff fully agrees, as follows:

"It is not the grade of service but the character of the act to be performed that determines whether a person is a vice principal or a fellow servant." (Brief, p. 66.)

Also quoting from Thompson on Negligence, sec. 4923, (brief 73-4) as follows:

"It must be carefully borne in mind that the comparative grade or rank of the servant inflicting the injury and of the servant receiving the injury is not the controlling test by which to determine whether or not the master is liable, but it is the character of the negligent act or omission; so that when a servant of whatever grade or rank in the service, even the lowest, is charged by the master with the performance of duties in favor of his other servants which the law requires the master to perform, to the end of promoting

their safety, and such servant, while in the performance of those duties, inflicts a negligent injury upon another servant, the master will be answerable in damages for it on the ground that the servant inflicting the injury is his vice-principal, and not a fellow-servant with the one receiving the injury."

Plaintiff might well rest on the foregoing statements of the law, but adds the following from Labatt:

"Whether the employee whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated. His official denomination will not, of itself, determine whether or not he was a representative of the master." Sec. 1434.

"Both on principle and authority it is manifest that a master is no less responsible for the negligence of an employee who is temporarily filling the position of an *alter ego*, than he is for the negligence of an employee who holds that position permanently." Sec. 1435.

It is admitted that Van Campen was superintendent of the mine, and while it is not specifically stated in the record it is clear by necessary inference from numerous statements that on the night shift Green had control of all operations. He was acting superintendent. On page 51 plaintiff says that after dinner in the lunch house:

"We all went back, the whole bunch, and then Mr. Green gave us the orders what we are to do.

"Q. How many were there of you?

"A. I don't know how many there were. I never counted them."

If Green was not vice principal and directing ag-

ent of the corporation when he was in charge of all its work in and out of the mine that was in progress at midnight, then the mine was running itself. It had no principal if it had no vice principal.

Nothing remains to consider but exceptions to instructions of the trial court. It is unnecessary to suggest that defendant waived its motion for a nonsuit by proceeding with the trial and offering testimony. The motions for a directed verdict and for a new trial are covered in discussion of the evidence and the instructions to the jury. While the exceptions to the instructions were numerous they are largely repetitions and only a few are discussed in defendant's brief.

The argument excepts particularly to these instructions, found on page 142-3:

"The duty of providing a safe place to work cannot be shifted by the master, and the agent representing the master in the premises must perform that duty, and if he fails, through negligence, the negligence is that of the master."

"If the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work, and safe appliances and tools, he is liable for resulting injuries to employees."

The only criticism that can be made of these instructions is the statements regarding the duty of the master to provide a safe place to work. In the same instructions, however, the court carefully stated the duty to be to take reasonable care to provide a safe

place to work. It is very common for courts to say it is the duty of the master to furnish a safe place to work. It is a harmless inadvertence when qualified by the more accurate statement of the master's duty to exert reasonable care. The opinion of the court in *Santa Fe Pacific R. v. Holmes* 202 U. S. 438, says as already quoted in this brief:

"The duty of the master to furnish safe places for employes to work in and safe appliances to work with is a continuing one to be exercised wherever circumstances require it."

Kreigh v. Westinghouse, *supra*; *Grand Trunk v. Cummings*, *supra*; and *Deserant v. Cerillos Coal R. Co.*, *supra*; in the extracts given herein speak of the duty of the master to provide a safe place to work.

The loose statement that the master must furnish a safe place to work is made so often that it is unnecessary to go outside defendant's brief to find instances. On page 51 *Citrone v. O'Rourke* is quoted, containing the following language:

"The rule of law which makes it incumbent upon an employer to provide or maintain a safe place in which his employees are to do their work."

And in the same extract this quotation from another case:

"The rule that a master must provide a safe place for work only where," etc.

On pages 51-2, in *Russell v. Lehigh Valley*, the court speaks of "the failure to furnish a safe place for

plaintiff to work in," and "the rule that the master must furnish a reasonably safe place."

On pages 53--4 in *Petaja v. Aurora M. Co.* similar references are twice made.

On page 67 this language is quoted from *Callan v. Bull*:

"The rule which requires the master to provide a safe place and safe appliances for the servant."

And on page 54 counsel themselves say: "The Michigan court affirmed the judgment holding the duty of providing a safe place to work," etc.

In *Taylor v. Atchison Gravel Co.*, 135 P. 576, exception was taken to an instruction that:

"The master owes the servant the duty of exercising reasonable care and diligence, and to provide the servant with a reasonably safe place in which to work." The Kansas supreme court held that "the inaccurate statement does not justify a reversal."

In the next paragraph of the opinion (p. 577) the court says:

"A reference was made to the duty of furnishing safe tools. This was unnecessary but not prejudicial. The instructions concerning assumption of risk are criticised. Assuming that they lacked accuracy, we think the verdict cannot have been influenced thereby, in view of the character of the issue of fact."

The instructions of the trial court in the case at bar gave wide latitude to the jury to decide for the defendant. Every phase of the law of negligence applicable to the case was fairly covered. Some very

strong instructions asked by defendant were given. (R. 144-5.) One of these (p. 145) specifically instructed the jury that plaintiff could not recover unless they found from the evidence that the defendant corporation entrusted to Green, the shift boss, the duty of clearing the wall after a shot.

Plaintiff respectfully submits that it is difficult for an unbiased legal mind to say that if the instructions criticised in defendant's brief had been omitted and if nearly all those asked by defendant and refused by the court had been given the verdict would have been different.

On pages 74-5 of defendant's brief instructions excepted to are noted as VI, VIII and IX. These appear in the record as VIII, X and XI, on pages 202-3-4. The objection is based on the argument that these instructions make the chief test of vice-principalship control and authority to direct and command. This is law in jurisdictions where the superior servant rule prevails, and is explained and qualified in other instructions. In IX or XI (R. 204) it is coupled with the statement:

"Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate."

The instructions as a whole made plain to the jury that the plaintiff must recover, if at all, on the negligence of the defendant corporation, which in case of

a corporation must mean its responsible agents. The question of Green's responsibility and authority was as fairly put by the court as the principle is laid down in an authority quoted by defendant's brief on page 71—Judge Sanborn in *Weeks v. Scharer*, 111 Fed. 330:

"A servant is not, and a master is, liable for the negligence of a fellow-servant while he is engaged in discharging the personal duty of the master to use ordinary care to provide for a reasonably safe place, reasonably safe tools, and reasonably competent servants. An employee frequently acts in a dual capacity—at times a fellow-servant, at times a vice-principal—and the line of demarkation between the negligence whose risk the servant assumes and that for which the master is liable is this: If the act is done in discharge of a positive duty of the master, then negligence therein is the negligence of the latter. If it is done in discharge of any other duty of the employee, it is the negligence of the servant, the risk of which his fellows have assumed."

The substance of the foregoing was given by the trial court, as follows: (R. 205.)

"Certain duties are said to be non-delegable. By this is meant that such duties are personal to the master, and he cannot delegate them to a servant and then escape liability, if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if the duty is one personal to the master the one to whom he entrusts the performance of this duty is called a vice-principal, and the master is liable for his negligence in relation to such duties."

This is the rule heretofore cited in both these briefs from *Thompson on Negligence*, sec. 4923.

Counsel for plaintiff (defendant in error) respectfully urge that on the whole record it is shown that the issues were fairly submitted on the law, with no material error, and the jury found the facts under the law against the defendant, plaintiff in error on this appeal.

E. E. RITCHIE,

Attorney for Defendant in Error.

No. 2360

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE BEATSON COPPER COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN PEDRIN,
Defendant in Error.

Reply Brief of Plaintiff in Error.

R. J. BORYER,
MYRICK & DEERING,
Attorneys for Plaintiff in Error.

Filed this.....day of May, A. D. 1914.

.....Clerk.

By....., Deputy Clerk.

THE JAMES H. BARRY COMPANY
SAN FRANCISCO

FILED
MAY 13 1914

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE BEATSON COPPER COM- PANY, a Corporation, <i>Plaintiff in Error,</i>	}	No. 2360.
vs.		
JOHN PEDRIN, <i>Defendant in Error.</i>	}	

REPLY BRIEF OF PLAINTIFF IN ERROR.

Replying to the defendant in error we wish briefly first to discuss certain of the facts of the case, then the law.

Defendant in error, John Pedrin, was an experienced miner when he started to work for the Beatson Copper Company some time in November, 1912 (R., 39-40). It is conceded that he had been working steadily in and about the "glory hole" for two weeks prior to the night on which he was injured (R., 47). His work was that of a "mucker," that is he was breaking up and shoveling away the rock blasted from the sides of the pit (R., 26). Two men with a machine drill were boring holes at the edge of the pit for the charges of explosive that were to break down its sides

(R., 26). The general work in which the entire gang was employed was the excavation of the pit and removal of ore-bearing rock therefrom. Green, a shift boss, was one of the laborers working with the men and apparently exercising some authority over them. Counsel for defendant in error says at page 4 of his brief: "He was in charge of all the operations on the shift, which included work in other parts of the mine and outside of it." And at page 30 of his brief he says: "He was acting superintendent." These statements, we submit, are utterly unwarranted.

The following testimony of John Schmitt sheds light on this subject:

"Q. He was just pit boss, was he?

"A. I don't call him boss and nobody call him boss that is working there.

"Q. He was an ordinary laborer?

"A. *Certainly*, worse than laborer—a laborer understands more of the work than this foreman that was there" (R., 114-115).

And at page 116 of the record, Schmitt testifies that he does not know what Green's position was with the company or what authority he possessed. Green was merely shift boss (R., 109) or foreman (R., 27).

Under the work of this group of men the "glory hole" was gradually growing larger. And the place in and about which Pedrin was laboring was, by reason of the work itself, constantly altering its character. As Schmitt testified: This glory hole was constantly

changing by reason of breaking down of the walls from the shooting and blasting at the top (R., 109).

Obviously, under such circumstances, there was an ever present danger that the side wall might cave at some weakened spot, or loosened rocks might roll from above, injuring the men beneath. This was a peril inherent in the very work done.

Defendant in error challenges (p. 4) our statement that it was the duty of plaintiff and his fellows to pry away the loose and overhanging rock, yet admits it later in his brief at page 22. Such, moreover, is the testimony of both Pedrin and Schmitt, as may be seen by reading pages 60 to 63 of our opening brief. We respectfully maintain that the statement of the case made in our opening brief is both accurate and impartial.

Such being the evidence, can it be said that the trial Court gave proper instructions to the jury?

FIRST, TO REPEAT AS TO THE PLACE TO WORK.

We have shown (Opening Brief, pp. 43-60) that to use Labatt's language: "Where the work is of such
 " a character that, as it progresses, the environment
 " of the servant must necessarily undergo frequent
 " changes the master is not bound to protect the ser-
 " vants engaged in it against the dangers resulting from
 " those changes. The cases in which this principle is
 " most usually applied are those involving the various
 " kind of construction work" (2 Labatt, M. & S.,

§ 588). Defendant in error concedes at page 19 of his brief that this is the correct rule.

Yet the trial Court instructed the jury that "the duty of providing a safe place to work *cannot be shifted*" (Specification IX, R., p. 204). The Judge told the jury that this duty was one that could not be delegated to a subordinate (same specification); although it is not denied by our opponent that the law is, in cases like the one at bar, directly contrary to this charge, viz: in excavating, mining or quarrying, where, by reason of the work done, the place was constantly changing, the duty of keeping the place is that of the servants and not of the master.

And, as if by way of emphasizing the error, the Court in its next instruction (R., pp. 204-5) makes the master responsible for "care *corresponding to the hazards* of the business." This, fairly interpreted, would mean that inasmuch as the conditions of the place of work were constantly changing under the hand of the workman himself the master is required to be ever at the pit-side, guarding his men against possible mishap of their own creating. This is not the law. The jury was never properly advised. And under such instructions it was impossible for the jury to do other than render its verdict for the plaintiff.

The Court did not even leave it to the jury to determine whether under the facts of this case the master was responsible for a danger arising by reason of the excavating and blasting done.

On the contrary he substantially stated that the master must keep the place safe; that this duty was non-delegable; that the degree of care was commensurate with the danger; that whoever was attending to the matter, irrespective of rank, was a vice-principal, since the master could never abate his watchfulness.

Our complaint is of the failure to submit for the decision of the jury the question of liability under instruction, which pointed out the difference between a fixed, constant, finished place in which to work, and the place where the risks were changing as the work which the men were doing progressed. There is nothing in the instruction given which suggested to the jury any difference in the law in the two cases, and plaintiff in error's instruction was refused (R., pp. 214-215).

SECOND, AS TO THE FELLOW-SERVANT FEATURE OF THE CASE.

So, also, the general rule, as pointed out in our opening brief, is that the foreman or shift boss is the fellow-servant of the other members of the working crew with respect to the keeping of the place of work safe from dangers arising in the progress of the work. The negligence of such shift boss would be, as we have shown, the negligence of a fellow-servant, for which the master is not responsible. The evidence fairly construed leaves no question, we believe, as to the posi-

tion of Green. We believe it cannot be disputed that he was simply a fellow servant of Pedrin. However, our opponent contends that an inference may be drawn to the effect that he was a vice-principal, or practically an acting superintendent. This variance of opinion simply emphasizes the seriousness of the error made by the trial Court when he charged the jury in substance that Green was a vice-principal. It left no possibility for the jury to hold otherwise. The Court stated that the duty of keeping the place safe was not to be delegated, and that whoever represented the master in this respect was a vice-principal. Thereby the Court drove the jury to the conclusion that Green was a vice-principal and not a fellow-servant. This, we contend, was serious error, since if Green were a vice-principal at all he was not so by reason of the duty which he was then discharging, but by reason of authority conferred upon him by his master, of the existence of which authority there is no evidence in the record.

The contention made by our opponent at page 19 of the brief, that an unnecessary risk was added, which unnecessary risk is suggested in the assurance given by Green that the place was safe, is a contention made apart from the instructions. Upon this subject, so far as we know, the Court was silent, and whether there be any merit in our opponent's contention in this respect or no it was clear that we were entitled to a proper instruction as to the duty of

keeping the place safe, and a proper instruction as to the law determining whether Green was a vice-principal or fellow-servant. These errors, irrespective of this added element, are sufficient to entitle us to a reversal, but if we are right in our contention that Green was, with respect to the duty of keeping the place safe, a fellow-servant, and not a vice-principal, then it follows from the authorities cited in our opening brief that the master was not responsible for Green's giving an assurance that the place was safe. See cases cited in our opening brief at page 77.

We respectfully submit that the jury was not instructed upon the law applicable to the facts of the case, that the distinction between a permanent and a changing place in which to work was not pointed out but disregarded, that the jury was improperly instructed upon the subject of fellow-servant, in the particulars pointed out, and that the rights of the defendant below, plaintiff here, and the question whether it was liable or not for this injury were not submitted to the jury under instructions which properly defined those rights and its liability.

Respectfully submitted.

R. J. BORYER,
MYRICK & DEERING,
Attorneys for Plaintiff in Error.

No. 2372

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

vs.

CHARLES HARMAN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

FILED
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Names and Addresses of Attorneys of Record.

Messrs. MAURY, TEMPLEMAN & DAVIES, of
Butte, Montana,

Attorneys for Plaintiff and Defendant in
Error.

Messrs. VEAZEY & VEAZEY and W. L. CLIFT,
of Great Falls, Montana,

Attorneys for Defendant and Plaintiff in
Error. [1*]

*In the District Court of the United States, District
of Montana.*

No. 306.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

BE IT REMEMBERED, that on February 21st,
1913, the plaintiff filed his complaint herein, as fol-
lows, to wit: [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States, District
of Montana.*

AT LAW.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

Complaint.

Plaintiff complains, and for a cause of action, alleges:

1. That plaintiff at all times herein mentioned was and now is a citizen and resident of the State of Montana.

2. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and a citizen of said State.

3. That the amount involved in this controversy, exclusive of costs and interest, is more than Three Thousand (\$3,000.00) Dollars.

4. That the defendant is a railroad corporation and engaged in conducting a general railroad business in Montana, and particularly in Jefferson County thereof, and through the town of Basin therein; that the railroad track of the defendant used by it for conducting its general railroad business in said county and town runs through a tunnel at a point about two miles in an easterly [3] direction

from the said town of Basin; that for a period of about six (6) months prior to the 28th day of November, and on said date, Bates & Rogers, contractors, were engaged by the defendant, and in behalf of the defendant were repairing said tunnel, and said contractors had in their employment continuously in prosecuting said repairs during said time about sixty (60) men; that said town of Basin was at all of said times the headquarters and the railroad depot of and for said contractors from which such contractors secured all of the supplies and materials used by them in prosecuting said repairs of said tunnel; that the only practical way and route from said tunnel to said town of Basin was over defendant's railroad track which ran from said tunnel to said town of Basin, and during all of the times herein mentioned said contractors and all of the men employed by them were constantly and continuously using and traveling over the defendant's railroad track between the aforesaid tunnel and the town of Basin for the purpose of securing supplies and material for prosecuting said repairs at said tunnel, and for their own benefit and convenience, with the full consent, acquiescence and knowledge of the defendant.

5. That on the 28th day of November, 1912, the plaintiff, who had prior to said date been an employee of said contractors and working on said tunnel, left the employment of said contractors and started to Basin over the railroad track of the defendant; that at a distance of approximately one-half mile from Basin, while the plaintiff was traveling over the defendant's railway track, and traveling

through a sharp curve and an obscure place, the defendant carelessly and negligently operated one of its engines over [4] its said track at said place, and carelessly and negligently failed to blow the whistle and ring the bell on its engine in approaching said obscure place, and did carelessly and negligently drive and run its said engine and train into and against the plaintiff and caused him grievous bodily injury as hereinafter set out.

6. That at the time of said accident and injuries to the plaintiff, the defendant, by the exercise of ordinary care on its part, should have known and did know that this plaintiff was traveling over the said track of the defendant, and that he was liable to be injured by it unless the defendant exercised ordinary care on its part to avoid injury to him.

7. That at the time of the said accident and injuries to the plaintiff, the plaintiff was exercising all due care and caution on his part, and was wholly and entirely unaware of the approach of said train in time to avoid said accident and collision to him.

8. That as a result of said accident and injuries to the plaintiff, the plaintiff's left leg was crushed and broken, plaintiff's back was severely sprained and injured; plaintiff received severe injuries about the head and right arm; that plaintiff, as a result of said accident, was rendered unconscious and has been ever since said accident and now is under the care and attention of a physician and surgeon; his said injuries are permanent in character and have caused him to suffer great physical and mental pain and anguish; that at the time of said accident and

injuries, plaintiff was a strong, healthy, able-bodied man, earning and capable of earning Four (\$4.00) Dollars per day; that as a result of said accident and injuries his earning capacity has been completely destroyed to the present time, and for a long time in the future.

9. That it was necessary for plaintiff to expend [5] for medical and surgical care and nursing for the said injuries the sum of Three Hundred (\$300.00) Dollars; the same is a reasonable sum for the same, and plaintiff has paid the same. There will be further expense hereafter for medical and surgical treatment and nursing, but plaintiff is at this time unable to say how much.

10. That by reason of said accident and injuries, the plaintiff has been damaged by the defendant in the sum of Ten Thousand Three Hundred (\$10,300.00) Dollars.

WHEREFORE plaintiff demands judgment against the defendant for the sum of Ten Thousand Three Hundred (\$10,300.00) Dollars and costs of suit.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Plaintiff. [6]

United States of America,
State of Montana,
County of Silver Bow,—ss.

Charles Harman, being first duly sworn, deposes and says: I am the plaintiff in the above and foregoing complaint named; I have read the same and

know the contents thereof; that the same is true of my own knowledge.

CHARLES HARMAN.

Subscribed and sworn to before me this 19th day of February, 1913.

[Seal]

A. C. McDANIEL,

Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Dec. 10th, 1915.

Filed Feb. 21, 1913. Geo. W. Sproule, Clerk. [7]

Thereafter, on February 21, 1913, Summons was duly issued herein as follows, to wit: [8]

[Summons.]

UNITED STATES OF AMERICA.

District Court of the United States, District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the city of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting, to the Above-named Defendant, Great Northern Railway Company, a Corporation.

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana, this 21st day of February, in the year of our Lord one thousand nine hundred and 13, and of our Independence the 137.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk. [9]

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within summons on the 24th day of February, 1913, and personally served the same on the 24th day of February, 1913, on Great Northern Railway Company, a corporation, by delivery to, and leaving with, I. Parker Veazey, Jr., Attorney for said defendant named therein personally, at Great Falls, County of Cascade, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Clerk of U. S. District Court attached thereto.

Dated this 24th day of February, 1913.

WILLIAM LINDSAY,

U. S. Marshal.

By Jas. A. Gillan,

Deputy.

[Endorsed]: No. 306. U. S. District Court, District of Montana. Charles Harman vs. Great Nor. Ry. Co. Summons. Maury, Templeman and Davies, Butte, Mont., Plaintiff's Attorneys. Filed Feb. 24th, 1913. Geo. W. Sproule, Clerk. By _____, Deputy Clerk. [10]

Thereafter, on May 19, 1913, Answer was duly filed herein, as follows, to wit: [11]

*In the District Court of the United States, in and
for the District of Montana.*

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

Answer.

Comes now Great Northern Railway Company, defendant in the above-entitled cause, and for its answer to the complaint filed in said action, admits, alleges, and denies, as follows:

I.

For its first separate answer to said complaint, defendant admits, alleges and denies, as follows, to wit:

1. Save as hereinafter specifically admitted or denied, defendant denies each and every allegation, matter, and thing in said complaint contained.

2. Denies that it has, and alleges that it has not, any knowledge or information sufficient to form a belief as to plaintiff's citizenship or residence.

3. Admits that it is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and is engaged in operating a line of railroad in and through the county of Jefferson and town of Basin, in the State of Montana, which line of railroad extends through a tunnel situated about two miles easterly or northeasterly from said town of Basin; which tunnel was during the fall of 1912 being repaired and relined by the Bates & Rogers Construction Company under contract with defendant railway company. Defendant also admits that [12] plaintiff was employed by said Bates & Rogers Construction Company prior to November 28, 1912, in connection with said work of repairing and relining said tunnel.

4. Defendant further admits that plaintiff left the employment of said Bates & Rogers Construction Company on the 28th of November, 1912, and alleges that he thereupon, together with another former employee of said construction company, wrongfully took and appropriated a certain hand-car belonging to defendant, and wrongfully, unlawfully, and without authority or permission of said defendant, placed same on defendant's track, and plaintiff, together with said former employee of said construction company, boarded said hand-car and propelled same on

and along defendant's track from said tunnel toward the said town of Basin. Defendant further alleges that while said car was being wrongfully, carelessly, and recklessly run and operated along defendant's said track by said plaintiff and said former employee of said construction company, and while said hand-car was wrongfully upon said track, the same was struck by one of defendant's passenger trains, which was being carefully, cautiously, and properly operated on and along said track, and said hand-car was thrown from said track and against the plaintiff.

5. Defendant further admits that plaintiff received some personal injuries as a result of said accident and collision, but denies that it has, and alleges that it has not, knowledge or information sufficient to form a belief as to the extent of such injuries; and defendant, therefore, leaves the plaintiff to make such proof thereof as he may be advised.

6. Defendant denies that said train and engine were carelessly or negligently operated, or that proper signals were not given by bell and whistle of said train's approach; and further denies that defendant had any notice, knowledge, or information that plaintiff was traveling on and over said track, or could by the exercise of ordinary care have known or ascertained that plaintiff was on said track and exposed to danger of collision with said train, [13] or could by the exercise of care and caution have discovered plaintiff on said track in time to avert the accident which resulted from the collision between said train and said hand-car.

II.

For its second separate defense to said complaint, defendant admits, alleges, and denies as follows:

1. Alleges that if it was in any respect negligent in any of the matters set forth in said complaint, then and in that event the damage sustained by plaintiff, to whatever extent the same exists or has existed, was due to, and caused by, plaintiff's own contributing fault and carelessness, as hereinafter set forth and otherwise; and that plaintiff's own fault and carelessness and his failure at all times and places set forth in the complaint to exercise such reasonable care and caution, for his own safety, as the average reasonably prudent person, under all the circumstances then and there existing, could, should, and ordinarily would have exercised, as hereinafter set forth and otherwise, was a proximate cause of, and contributed to cause, his said damage.

2. That in the exercise of such reasonable and ordinary care and caution, for his own safety, as the average reasonably prudent person in his situation, under all the circumstances existing at the time and place mentioned in the complaint, should, could, and ordinarily would have exercised, plaintiff should have known and appreciated, and, in fact, actually well knew and appreciated, that trains and cars might be run and operated along said track at any time, and that the train which struck said hand-car was due to pass along and over said track at the exact time it did in fact do so.

3. Alleges that as plaintiff and the former employee of said construction company, hereinabove re-

ferred to, were propelling said hand-car along said track, as hereinabove alleged, they saw, [14] heard, or discovered the train which collided with said hand-car, approaching, and immediately alighted from said car and endeavored to remove said car from said track. Defendant further alleges that after plaintiff saw, heard, or discovered said train approaching, he had sufficient and ample time to leave said car and track and reach a place of safety before said train came in contact with said car; but, notwithstanding the close proximity of said train, which, as plaintiff well knew, was moving rapidly towards him, he carelessly, negligently, and recklessly remained on said track, or dangerously close to same, until said train struck said hand-car and threw said car from said track and against the plaintiff, causing the injuries complained of in this action.

4. Defendant further alleges that, in the exercise of such reasonable care and caution as the average reasonably prudent man, under all the circumstances then and there existing, could, would, and should, and ordinarily would have exercised, plaintiff should and would have proceeded from said tunnel to said town of Basin by some road, route, or way other than defendant's said railroad track, such other road, route, or way being then and there available to him; and should not have attempted to proceed along said railroad track with said hand-car when he knew, or in the exercise of ordinary care should have known, that defendant's trains might be operated along said track at any time; and defendant further alleges that, in the exercise of such reasonable care and cau-

tion as the average reasonably prudent person, under all the circumstances then and there existing, could and should and ordinarily would have exercised, plaintiff would and should have left said car and said track when he saw, heard, or knew said train was approaching, and gone to a place of safety, then and there readily available to him; and that his unnecessary, unauthorized, wrongful, careless, negligent, and reckless failure and refusal to leave said track after seeing, hearing, or [15] discovering said approaching train, was a proximate cause of the injuries sustained by him.

WHEREFORE, having fully answered, defendant prays that it be dismissed hence with its costs and disbursements herein.

VEAZEY & VEAZEY, and
W. L. CLIFT,

Attorneys for Defendant. [16]

State of Montana,
County of Cascade,—ss.

W. L. Clift, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant, Great Northern Railway Company, in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information, and belief. That affiant makes this affidavit of verification for and on behalf of defendant, Great Northern Railway Company, for the reason that defendant is a corporation and none of the officers of said corporation are within the

county of Cascade, State of Montana, where affiant resides.

(Signed) W. L. CLIFT.

Subscribed and sworn to before me this 17th day of May, 1913.

[Notarial Seal] (Signed) R. B. NOONAN,
Notary Public for the State of Montana, Residing at
Great Falls, Cascade County, Montana.

My commission expires Nov. 18, 1915.

Filed May 19, 1913. Geo. W. Sproule, Clerk.
[17]

Thereafter, on May 24, 1913, Reply was duly filed herein as follows, to wit:

*In the District Court of the United States in and for
the District of Montana.*

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

Reply.

Comes now Charles Harman, plaintiff herein, and for his reply to the answer of the defendant on file herein, admits, denies and alleges as follows, to wit:

1.

For his reply to the first separate answer of the defendant to plaintiff's complaint, admits that the plaintiff, at the time he left the employment of Bates

& Rogers Construction Company, together with another former employee of said Construction Company, placed a certain hand-car on defendant's track, and plaintiff, together with said former employee of said Construction Company, propelled said hand-car on and along defendant's track from the said tunnel mentioned in plaintiff's complaint towards said town of Basin; and that while said hand-car was being run and operated along defendant's said track by this plaintiff and a former employee of said Construction Company, and while said hand-car was upon said track, the same was struck by one of defendant's passenger trains, and that said hand-car was thrown from said track and against the plaintiff. And denies each and every other allegation [18] and all other allegations contained in paragraph 4 thereof.

2.

Plaintiff, for his reply to the second separate defense of the defendant set out in its answer on file herein, denies generally each and every allegation and all allegations therein contained.

3.

Plaintiff for his reply to the answer of defendant, denies generally each and every allegation and all allegations therein contained except the allegations hereinbefore specifically admitted or denied.

Wherefore plaintiff having fully replied to the answer of defendant on file herein, demands judgment in accordance with the prayer of his complaint.

MAURY, TEMPLEMAN & DAVIES.

Attorneys for Plaintiff.

United States of America,
State of Montana,
County of Silver Bow,—ss.

J. O. Davies, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff, Charles Harman, in the above-entitled action; that he has read the above and foregoing reply and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief; that affiant makes this affidavit of verification for and on behalf of the plaintiff, Charles Harman, for the reason that said plaintiff is absent from and is not now present within the County of Silver Bow, State of Montana, the place where affiant resides.

J. O. DAVIES.

Subscribed and sworn to before me this 23d day of May, 1913.

[Seal]

A. C. McDANIEL,
Notary Public for the State of Montana, Residing at
Butte, Montana.

My commission expires Dec. 10, 1915.

Filed May 24, 1913. Geo. W. Sproule, Clerk.
[19]

Thereafter, on July 15, 1913, the Verdict of the jury was duly filed and entered herein, as follows, to wit:

In the District Court of the United States, Ninth Circuit, District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Verdict.

We, the jury in this case, find our verdict in favor of Charles Harman and against defendant, and we assess Harman's damages at the sum of Fifteen Hundred (1500) Dollars.

J. FRANK REDPATH,

Foreman of the Jury.

Filed and entered July 15, 1913. Geo. W. Sproule,
Clerk. [20]

Thereafter, on July 18, 1913, Judgment was duly entered herein, as follows, to wit: [21]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

Judgment.

BE IT REMEMBERED, that this cause came on regularly for trial before the Court on the 12th day of July, 1913. Plaintiff was represented by Maury, Templeman & Davies, Attorneys at Law. The defendant was represented by Messrs. Veazey and Veazey, Attorneys at Law. A jury of twelve good and lawful persons was regularly sworn and empaneled to try the case. Witnesses were sworn and testified on behalf of the plaintiff. Witnesses were sworn and testified on behalf of the defendant. Counsel for the respective parties argued the cause to the jury. Thereupon the Court instructs the jury as to the law, and thereupon the jury retire in the custody of sworn bailiffs to consider of their verdict, and subsequently return into open court and say, after title of court and cause.

“We, the jury in this case find our verdict in favor of Charles Harman and against the defendant Great Northern Railway Company, and we assess Harman’s damages at the sum of \$1500.00.” [22]

The jury each and all answered that such was their verdict.

Wherefore, by reason of the law and the premises, it is ORDERED, ADJUDGED AND DECREED that Charles Harman have and recover of and from Great Northern Railway Company, a Corporation, the sum of Fifteen Hundred (\$1500) Dollars, together with interest thereon at eight (8%) per cent per annum from the date of the said verdict, to wit,

July 15th, 1913, and recover its costs of suit hereby taxed at Fifty and 50/100 Dollars.

Filed and entered this 18th day of July, 1913.

GEO. W. SPROULE,

Clerk. [23]

United States of America,

District of Montana,—ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 18th day of July, A. D. 1913.

GEO. W. SPROULE,

Clerk.

By _____,

Deputy Clerk.

Filed and entered July 18, 1913. Geo. W. Sproule,
Clerk. [24]

And thereafter, on September 25, 1913, Bill of Ex-
ceptions was duly settled and allowed and filed
herein, being in the words and figures following, to
wit: [25]

*In the District Court of the United States, in and for
the District of Montana.*

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That at a stated term, to wit, the April term of the above-entitled court sitting at Helena, this cause came on regularly for trial upon the complaint of the plaintiff, the answer of the defendant thereto, and the reply of the plaintiff to said answer, before the United States District Court for the District of Montana, on the 12th day of July, 1913, the Hon. George M. Bourquin, the Judge thereof presiding. H. Lowndes Maury, Esq., of the firm of Messrs. Maury & Templeman, appeared as attorney for the plaintiff, and H. C. Hopkins, Esq., and Messrs. Veazy & Veazy, as attorneys for the defendant. A jury of twelve persons was duly and regularly impaneled and sworn to try said cause, whereupon the following proceedings, and none other, were had, and the following evidence, and none other, was introduced, to wit:

[Testimony of Charles Harman, in His Own Behalf.]

CHARLES HARMAN, the plaintiff in the above-entitled cause, being first duly sworn in his own behalf, testified as follows:

Direct Examination.

My name is Charles P. Harman. I was born in Augusta County, Virginia, and am forty-five years of age. I first came to Montana about the 15th of July of last year, 1912. I came here with the intention of taking up a homestead, buying land, and getting work on the railroad, that is on railroad construction or anything in that line. I have been

(Testimony of Charles Harman.)

following railroad construction ever since 1889 and [26] 1890. For thirteen months I was a volunteer in the United States Army—a volunteer in the Spanish-American War. I have helped in railroad construction work and in operating railroad equipment. I have operated steam shovels and donkeys and worked on bridges and on the track doing surfacing work. I have worked in operation of locomotives. I worked for the Chesapeake & Ohio as fireman on one occasion for four months. I have handled locomotives and have handled them successfully on the hills.

I claim that I am a citizen of Montana and claim that I was a citizen of Montana on the 20th of February, 1913, and I was such citizen at that time. I came here with the expectation of making Montana my permanent home. I first went to work when I came to Montana at Highgate for the Bates-Rogers Construction Company, building snowsheds. At that time I worked in the capacity of a carpenter, building snowsheds on the Great Northern Railroad. I stayed there working about four and one-half months. They then sent me to Basin to this tunnel job. They spoke of sending me to a tunnel in another direction, but I said I wanted to move my wife out here and get fixed for the winter, and I asked them how long probably the job would last. I understood this job would last four or five months, and that was my very reason for going to this tunnel job, because it was a lengthy job; and with land being opened down here, I would have an opportunity to in-

(Testimony of Charles Harman.)

investigate and enter land and at the same time have my family here with me at this tunnel job. I worked at this tunnel job at Basin about two weeks and was working as a carpenter. I was getting three dollars and a half a day. I have been working ever since 1889 and 1890, working for railroad companies from time to time generally. That was my line of work. I started out at fifty dollars per month a long time ago. In recent years I have gotten from one hundred fifty to two hundred dollars a month and board. When we left the tunnel on the morning of November 28th we started [27*—2†] out on a hand-car. We had expected to go on a work train. Other than the hand-car there was no other means of transportation to get my tool-box and baggage and bed-roll down to Basin, down to the station, and I didn't feel justified in throwing them away. I had to have some means of transportation and that was the only available means I had. I did not take the county road because I would have had to have gone through the creeks—the creeks across the county road.

I was fairly familiar with this portion of the track of the Great Northern Railroad between the tunnel and Basin. That track was a general thoroughfare. Everybody that went from the town of Basin to the tunnel, or from the tunnel to the town of Basin used the railroad track. During the two weeks that I was there from forty to sixty men were working at that

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

(Testimony of Charles Harman.)

tunnel. They were divided into night and day shifts. The night men would be using the track as a thoroughfare more or less in the daytime, and the day men would use it at night. Emergency supplies were procured from Basin for the tunnel by being brought back on this hand-car. This had been going on ever since I had been there. I was working inside on the tunnel and several times I noticed them using the hand-car bringing emergency supplies from Basin to the tunnel. That was within the two weeks that I was there. All along the line of the Great Northern Railway from Basin up to and within four or five miles of Butte, there was general repair work going on in the tunnels and this had been going on all fall and winter.

The railroad follows the creek-beds, and consequently it is necessarily a very crooked railroad, because it follows the creek to a certain extent, and the points of the hills jut out into the valley, and in order to avoid the heavy cuts, they use the curvature to lessen the cost of the road, and of course therefore the road is crooked.

After I and another man had started away with the hand-car, it was astounding to me when the fact was put to me that we and the [28—3] oncoming train were liable to meet. I didn't expect to meet a train until evening; I didn't expect to meet any more trains. In fact, I understood him to say that there would not be any more trains. We did not see any evidence of a train at all, and didn't hear any train. I first saw the train when it was within four or five

(Testimony of Charles Harman.)

hundred feet of the hand-car we were pushing; the train was then coming from a curved track. We were on a curve also. The place from which the train came was on a curve and necessarily obscure.

Q. What is the general custom among railroad engineers and people operating trains in the United States, as to making signals at obscure places?

Mr. VEAZEY.—We object to that as wholly immaterial; customs elsewhere cannot be binding on the defendant railroad company, and it hasn't been shown that there was any duty owing by the defendant railroad company to the plaintiff, and the conditions where the alleged customs are supposed to have existed are not shown to have been similar to the conditions existing here.

Which said objection was by the Court overruled. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

A. Sound the whistle.

On this occasion no whistle was sounded. My hearing is fairly good. It is as good as an ordinary man's hearing for loud noises. There was no noise there whatever to attract my attention from a signal if a signal had been given. We were traveling on the ground, pushing the hand-car along over the rails. It made practically no noise at all. I have been accustomed to hearing whistles long enough away to get a hand-car in the clear and get a load off of a hand-car, where the load consisted of poles. When we first saw the train coming we took our bag-

(Testimony of Charles Harman.)

gage and tool-box off the hand-car, and endeavored to get the hand-car off the track in the clear. When [29—4] I first saw the engine it was about four hundred feet away. I would say the grade of the track was about a two per cent grade, downgrade from Basin to the tunnel. It was what I would call a slight grade.

I have had considerable experience stopping and starting trains and engines. I have used air-brakes and am familiar with their use. I worked on machinery for six months and I have used air-brakes on steam engines, on donkey engines and such as that from time to time ever since I began work. I have an idea of the use of air-brakes on freight trains. I have handled air-brakes when I was a fireman. I have a knowledge of the approximate distance within which a train of the kind which struck the hand-car may be stopped. There were five or six coaches on that train. If there weren't more than six coaches with one engine on that grade, according to my experience, that train could be stopped in less than a train length. I have seen them stop a heavy train within ten or fifteen feet, going twenty-five or thirty miles an hour. The train which struck our hand-car was going about twenty miles, I dare say, when the train struck the hand-car when I was injured. I hadn't observed any checking of the speed of this train which struck the hand-car.

The hand-car, during the two weeks that I had been there, had been used for transporting stuff of Bates and Rogers, and anyone else in connection

(Testimony of Charles Harman.)

with the work, from one end of that tunnel to the other, and from Basin to the other end of the tunnel. I intended, when I might get to Basin to take our stuff off and bring the hand-car back to the tunnel.

I cannot say that I have seen the engineer on that locomotive to know him since. I saw him on the engine, but I didn't have time to take any more notice of him. I saw and heard the train coming, and it was in sight, and I was occupied in getting the hand-car and stuff off the track. I didn't have time enough to get into the clear myself and avoid the train. I suppose I could have gotten into the clear myself, if I had left the hand-car on the track. [30—5]

Q. Why did you not leave the hand-car on the track?

Mr. VEAZEY.—That might have a bearing solely on the issue of contributory negligence, but as regards any feature of the case that this man was trying to save his property, or to protect the train, which he had thus imperiled by his own act, we object to that question upon the ground that it seeks to elicit testimony not within the issues, with regard to negligence of the defendant, raised in the pleadings in this case.

Which objection was by the Court overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

A. I thought of getting into very serious trouble if I left the hand-car on the track and thereby wrecked the train.

(Testimony of Charles Harman.)

If I had left the hand-car on the track, the effect would have been nothing other than wrecking the train, provided the engineer didn't stop. I cannot say what part of the engine struck the hand-car. When the hand-car was struck we must have had the car off on the other side of the rail. In fact, we had all our baggage off. When the car was struck I would say it was on the outside of the rail, probably within a foot or two of the rail, about at the end of the ties. When the car was struck I was endeavoring to get the car shoved over a little further, so that it would clear good. It would take about three feet and a half or four feet—distance from the rail for the hand-car to have cleared the train. Three feet and a half would clear, I should think, with this small engine, or possibly four feet.

The proper place for an engineer in his cab, when his engine is in motion is on his box with his hand on the lever and his head out of the window. His side of the cab is the right-hand side and he looks ahead.

Looking at exhibit 7, the train which I have referred to [31—6] was coming from Basin and towards the bottom of the picture. The train was coming around behind the trees here from the left-hand side of the photograph, and to the bottom towards the point "X." We were putting the hand-car off on my right-hand side as I was looking towards the train. I was looking towards the train and pushing the hand-car towards the train. We were trying to put the hand-car on the side that the fireman is on. An ordinary passenger-car is sixty

(Testimony of Charles Harman.)

feet long. There were five or six cars on that train. I can't say that I ever got a sight of the whole train.

After I was struck I woke up at the hospital at Boulder. I found I had my leg broke. It was in a metal cast and bandaged up, and I found that I had a leg broke and was scarred up generally around the face and my right arm was hurt considerably, and my right shoulder was also hurt, and my back was hurt. I was at Boulder ten days. I was six weeks to the day with a weight attached to my leg. After leaving Boulder I went to the St. James Hospital in Butte, and after I left there I went over to my room and I was there ten days before I attempted to get up at all, and then after about a week I hobbled around in the room before I got out. Then I got a pair of crutches and hobbled up the street for a block or two, and continued with them for several weeks until along about the 7th of March, and then I went down to Glasgow on crutches. There I walked a block or two at a time. That was about as far as I could get. I was planning to go from Glasgow to look up land. I have not been able to follow my occupation at all since I have been hurt. I am not now able to do any hard work with that leg in that condition. It gives me a griping pain continuously in the muscles, and from time to time, in exercising my leg I can feel a kind of grating together in the bones of my leg, as though ends of bones were grating together, to the extent that at some times it almost makes me sick at the stomach. Before the train struck the car my condition of health was good.

(Testimony of Charles Harman.)

My habits as to being sober, couldn't have been better. I am not a drinking man, and have [32—7] never been a drinking man.

Cross-examination.

I was getting three dollars and a half a day from the Bates-Rogers Company for the days that I worked. I was with them nearly five months and lost only one hour of time. I had been down there at this work near Basin two weeks. They worked two shifts a day. One shift worked from seven o'clock in the morning until six in the evening. I worked on that shift, which was the day shift. I don't know the hours of the night shift. They worked ten hours. That work brought me principally inside the tunnel, but also outside. I worked in the tunnel as a carpenter. On the Basin side of the tunnel, outside of the tunnel, on one occasion we put up a coffer-dam for them to concrete the top of it, and put in a bracing along on the inside to brace it. The first day I was there we put in a floor at the other end of the tunnel, and some small buildings outside of the tunnel. Substantially, my work brought me all through the tunnel and a little at either end of the tunnel. I remember the place east of the tunnel about four hundred feet, where the railroad track crosses the county road overhead. I put in a bed for the trestle there to dump cars on.

Prior to working for Bates & Rogers I had worked in a mine in British Columbia for three dollars and seventy-five cents a day for about a month. Before that I was on my uncle's ranch in Washing-

(Testimony of Charles Harman.)

ton for a month just visiting. Before that I had some teams at work in Washington, D. C., working on my own account. I got one hundred and fifty to two hundred dollars a month working as a civil engineer part of the time in South America, and part of the time in the United States. As a civil engineer I got only seventy-five dollars a month while working in Georgia, and later one hundred and fifty dollars a month. During the last five years, beginning with 1907, I have earned on an average more than three dollars a day.

I couldn't say whether the county road I have referred to [33—8] extends from the road crossing under the bridge along the creek all the way to Basin—I never followed it up. You can see it from the track, yes, sir.

I contemplated first taking a work train to Basin before I used the push-car, but we missed that work train. It never occurred to me to take a livery team because I had nothing with which to pay for a livery team. I didn't have any discussion with any one in regard to getting a livery team. I never discussed with anyone getting a livery team. Somebody might have mentioned it to me after we got started but there was no discussion about it at first. The only reason why I didn't have a livery team was because I didn't have the money with me to pay for a livery team. I had with me a certificate of deposit for a thousand dollars. I was going to Basin to catch a train to Woodville in the direction of Butte.

The work train came there at the tunnel every

(Testimony of Charles Harman.)

day with supplies. The only teams I saw taking stuff from Basin were ranch teams going by. Material was delivered at the tunnel by this work train. When this work train wasn't delivering it they went to Basin and got it on the hand-car. This hand-car was being used as a push-car, a car which you shove along, ahead of you.

As I was going there along over that track we kept a view up the track quite a little way to the best of our ability, to see if anything was coming. We saw the engine just as it was rounding the curve and coming into view. To the best of our ability we were keeping a constant lookout as we operated the hand-car, to see whether there were any trains. I didn't hear any whistle before the train came in sight. I would say most emphatically that the engineer didn't give a stock whistle. Before the car was struck we had taken our baggage and tools off the car and had the hand-car off and was getting it out of the way. We had thrown the other things off the hand-car—the baggage and my tool-box and bedding. The bedding and baggage was done up in a bundle. We had on the car my dress-suit case and his [34—9] canvas bag and a roll of bedding and the tool-box. The canvas bag was one of those little mail bags. I think the train was going about twenty miles an hour—sixteen or twenty miles an hour when it struck the car.

The general country around there is mountainous country, but there is considerable level space on either side of the track, where there are trees and

(Testimony of Charles Harman.)

brush growing, coming around the curve. The walls of the mountains are not right close down to the track where the accident occurred. The grade of the mountain starts going up shortly after you leave the track. It would be called a hilly country rather than a mountainous country, except for the altitude.

I was dismissed by Bates & Rogers the day before the morning that I used the push-car. I had worked an hour and a half the morning of the day before. As we were operating this push-car, both of us were back of it, shoving it ahead. There was no one ahead of us pulling it.

My ears have never been treated. I have not had any accident to them to any extensive extent, outside of cold that you encounter living in tents. That might have affected my hearing in the ticking of a watch, but it never has affected my hearing any loud noises. Unfortunately, I worked on the G. & Q. and the Y. T. & Q. railroads. The water in the river near those railroads came down about a three and a half per cent grade and made such a noise that to hear yourself talk at all you almost had to holler, and it is a fault of mine that at times I got to talking louder than I do at other times. That accounts for my talking loud during this trial.

As I kept doing this work of getting my stuff off the hand-car, I cannot say that I kept looking at the engine to see how near it was to me. After it had come in sight I was unconscious of looking at the engine. I didn't want to get hurt, and at the same time my whole mind was concentrated in getting the

(Testimony of Charles Harman.)

hand-car in the clear.

Q. Did you look at the engine at any time after it came [35—10] in sight?

A. No more than looking that way.

I never lost a clean look at the engine from the time it came in sight. I had both the engine and the car in view at the same time. I say that a train of six cars or heavier, going twenty miles an hour, ordinarily can be stopped in a train length. I said that on one occasion I remembered seeing a train of six cars or heavier that was stopped in almost say ten feet, going twenty miles an hour, by the use of the brake. I was watching it at the time. A good man would stop such a train going twenty miles an hour in a train-length by the use of the reverse lever and the throttle and the air-brake.

I have had injuries before this. On one occasion I was driving a cart with a horse weighing about fourteen or fifteen hundred pounds, and the horse turned the cart over and caught my leg between the shaft and the horse and mashed it black and blue in a jelly. That was the right leg. It was the left leg which was injured by this collision between the hand-car and the train. The other injuries which I have received before this accident consisted in getting my fingers caught and my arm shot. My right leg is all right now. I would say that my hearing may be described by saying that I can hear loud noises as well as anybody else, but as regards soft noises I might not do so well.

(Testimony of Charles Harman.)

Redirect Examination.

I heard Mr. Veazey talking very plainly, yes, sir; every word he was saying, yes, sir.

Q. His voice is modulated and he is low-toned of voice? A. Ask that over again.

Q. Is his voice modulated low?

A. No, he is talking rather a little above the ordinary low tone of voice.

I have worked a day or two since the accident. I moved a [36—11] stove for a lady and got two men to go with me and move the stove. I also worked for a day and a half putting up sheeting on a building, but after the building was sheeted I wasn't needed any more. That was about May, I think.

I had this thousand dollar certificate of deposit at the time of the accident and I have got somewhere about three hundred dollars of it now. I paid my hospital expenses down there at Boulder and paid my hospital bill at St. James Hospital, and I had my wife's expenses and my children's expenses and my board and supplies. My wife came out from Staunton, Virginia, expressly to take care of me. I wired her that I was scared because they were talking about sending me to Warm Springs. I think the expenses at St. James Hospital were twelve dollars and a half a week. I think the expenses at the hospital at Boulder were twenty-six or thirty dollars. Dr. McGin of Butte doctored my leg after I arrived at St. James Hospital in Butte. I haven't paid his bill yet and don't know what it is. There

(Testimony of Charles Harman.)

was no stock whistle given before the car was struck.

Recross-examination.

I didn't hear any whistle. I took the hand-car off on my right-hand side as I was looking towards the engine. I was trying to shove it on my right-hand side as I was looking towards the engine. The other man was helping me and endeavoring to get the hand-car off the track. I couldn't say whether he had left the track before I had. He was on one side of the car and I was on the other. There was no way for the hand-car to be shoved against him. The train hit the car and shoved it against me and I was on the side, so that if the train hit the car, it would be shoved against me. My companion was on the left-hand side facing the engine, and all he had to do was to step off and give them a clear passage. I was on the right-hand side away from the track. I either had to run across there by the hand-car in front of the engine, or run away from the car or run [37—12] to the right of the car. I probably ran away from the car and then the engine struck the hand-car, threw it against me and knocked me down. I wasn't working on the car in the center of the track when the engine hit me, but was away from the track, handling the right-hand rear end of the car away from the track, and he was handling the left rear end of the car nearest to the track. I would say that I had pulled the car away off from the track far enough to get the car clear of the rail. I was on the right-hand side of the car,

(Testimony of Charles Harman.)

and he was on the left-hand side, and the train was coming towards us, coming in our faces. I was on the right-hand side, pushing the right-hand edge of the car, and he was on the left-hand side, pushing the left-hand edge of the car. We had gotten the stuff off and had gotten the car off on to the side of the embankment. I won't say just exactly how far the left-hand side was clear of the ties, but evidently not far enough to miss the engine or it wouldn't have been struck. The other man evidently stepped back, because he didn't get hurt. I didn't see the man on the left-hand side of the track. On the way along the track this man had cautioned me about helping him get the hand-car off if the occasion arose. I couldn't have gotten the car off as far as we did if he had gotten off some distance ahead of me. As soon as the train came in sight, both of us got the stuff off and got the hand-car away. I couldn't have done anything with the hand-car myself.

I would say that curvature was about six degrees. The engine when I first saw it was on the same curve with us. The train was coming downgrade, and we were going upgrade.

[Testimony of P. B. Foley, for Plaintiff.]

P. B. FOLEY, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct Examination.

In my work as claim agent for the defendant railway company, I have examined the place of the acci-

(Testimony of P. B. Foley.)

dent set forth in the complaint. [38—13] The place which was pointed out to me as the scene of the accident on exhibit 7 was about midway between this telegraph pole and this point of rock here—possibly a little nearer to the rock. The rock is the big rock on the left-hand side of the track looking west. That would be looking from the hand-car, if it was on the track, towards the approaching engine—looking west towards the approaching train. When that photograph, exhibit 7, was taken the camera was pointed towards the oncoming train looking west. That point was pointed out by the engineer. The size of an object in a photograph is the inverse to the square of the distance from the camera. As the distance from the camera increases, the object becomes less in size, and that is proportioned with the inverse of the square of the distance from the camera.

[Stipulations Concerning Certain Exhibits.]

Thereupon it was stipulated and agreed by and between the parties that exhibit 3 is a correct plat of the railroad track of the defendant from the town of Basin to and beyond tunnel seven. On this plat, the location of the curve referred to in the evidence is shown near the center of section sixteen, and is shown by an arc of 4° C.

It was further stipulated that exhibit 4 is a photograph taken by the defendant with the camera standing forty-five feet west of bridge 123, looking east;

That exhibit 5 is a photograph taken by the defendant with the camera standing two hundred and

(Testimony of William C. Riddell.)

fifty-four feet east of bridge 123, looking east;

That exhibit 6 is a photograph taken by the defendant with the camera, standing fifteen hundred and eighteen feet east of bridge 123, looking east;

That exhibit 7 is a photograph taken with a camera, standing forty-three feet east of telegraph pole 973, looking west;

That exhibit 8 is a photograph taken with a camera, standing four hundred ninety-five feet west of bridge 122 looking east, and showing bridge 122; [39—14]

That exhibit 9 is a photograph taken with the camera standing two hundred twenty feet east of bridge 122, looking west, showing bridge 122, and the curve around which the train in question proceeded, and the public road to the right.

[Testimony of William C. Riddell, for Plaintiff.]

WILLIAM C. RIDDELL, being first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

I am a physician and surgeon of about twenty-three years' practice in surgical experience in Montana in a large number of cases, some of them for the Great Northern Railway. I examined the left leg of the plaintiff in this case in the region of the thigh yesterday. I find what appears to be the result of a splintered fracture at the lower end of the thigh bone, about four inches above the knee. The leg now appears to be strong. There is an enlargement of the bone at that point, which is undoubtedly

(Testimony of William C. Riddell.)

due to what we call callous, which is a collection of foreign matter, which has not all been absorbed yet. There is apparently over an inch of shortening in the injured leg. I took a skiagraph of the splintered bone. A skiagraph is simply a shadow of the solid portions of the bone. It may be bone and it may be metal, and when an object is examined upon a plate or a paper, it takes an impression of it. It differs from a photograph in that a photograph is a negative. A skiagraph is what we call a positive or a simple shadow. An X-ray will penetrate the soft tissues of the body, but it won't penetrate bone as readily. It won't penetrate metal as readily as bone. Consequently metal will make a darker shadow than a bone will. The document which you hand me is a skiagraph of the lower end of Mr. Harman's thigh bone. The same is true of the second paper. One is taken in one position and the other resting in another position.

Whereupon said photographs were marked Plaintiff's Exhibits 1 and 2, and were offered and received in evidence without objection. [40—15]

In Plaintiff's Exhibit 1 the knee is marked with a "K." The thigh bone is the largest bone in the body. No part of the leg between the knee and the ankle is shown in these photographs.

In a complicated fracture of the thigh bone in a man forty-four years of age, I would expect a good result would follow. There would be a shortening of not more than an inch—perhaps a little more, without any angular or rotary displacement. I

(Testimony of William C. Riddell.)

should judge this was a good result in this case, judging from the case originally. It looks to me like a very bad fracture to start with, but of course I don't know anything about that. As a general rule, the liability in case of a fracture, for a leg to gain its prior strength, decreases with the age of the patient. The liability of the loss of strength increases with age. A broken thigh in a man fifty-five or fifty-six years of age is very much more apt to result in permanent disability than in one of twenty. In this case, this man has a very good alignment. The leg is in good shape, in good condition as far as the swing is concerned from side to side. There is some disability of the posture backwards, which causes the knee to go back further than it ought to. As he stands on it his knee will go back, and that undoubtedly will be a source of weakness. The weakness in the knee will never be repaired. The bone will probably get as strong as it ever was. There will be a tendency for this limp which exists there to get less. These fractures of a thigh all require from eight to twelve months before the callous will be absorbed. He probably will have, as I say, permanently more or less weakness in that knee, and is very liable, in a man of his age, to have more or less discomfort, and the limb will get tired quickly, and he will have more or less discomfort after long use, and more or less pain. I don't think to-day, he is able to follow such a life as general work, like civil engineering or general construction work, working in construction gangs. I think he will be able to do

(Testimony of William C. Riddell.)

work which requires hard working and heavy work, standing on his feet, but this will be at the expense of considerable discomfort and pain. The limb is going to be as strong as it ever was, [41—16] but it is almost invariable in these cases that you get more or less deformity, and where you get this backward displacement, and the bending back of the knee, he is very apt to be lame.

Cross-examination.

Fractures of the thigh bone do not necessarily result in a shortening of the bone. In children we get sometimes perfect anatomical results. In adults it is rare that we get perfect anatomical results. Probably in ninety per cent of the cases we do not get perfect anatomical results. As the leg is now, I don't think it would give him pain if he didn't walk very far. I think if he walked three or four blocks he would be tired. He would probably have a tired feeling in the leg and in the muscles. How much pain he would have, I couldn't tell. The only physical manifestation of his injury at the present time is a little enlargement of the bone, due to the callous matter not having been absorbed yet, and this shortening of the leg and this displacement backward of the knee more than it ought to be. If a man is forty-five years of age and yields nicely to treatment, and does not resist his doctors and is quiet in the hospital, his chances for recovery from an injury of this sort would ordinarily be good, so that there would be no substantial injury. I wouldn't say that I would expect him to come out of

(Testimony of William C. Riddell.)

it, however, without some shortening. You never know how much shortening there is going to be. If this man in the hospital, immediately after the injury, tore off the bandages and kicked his feet around, in spite of the protests of the doctors, it would lessen the chances of a good recovery. If he did this in this case, his present recovery would indicate that he would come within the ten per cent of adults that get good results. A man can do a whole lot of work sometimes, even in his condition. The muscles will improve up to a certain point. As to the distance that he would be able to walk, the personal equation comes in there. You cannot tell how far he could walk. I saw him three times—Wednesday evening, Thursday morning and yesterday morning. [42—17]

Redirect Examination.

There are better ways of controlling pain than by strapping down. Anesthetics or narcotics can be used. I think he had excellent surgical treatment. I should say it was a very excellent result, judging from my knowledge of conditions that existed at the time of the fracture. It looked to me as if it was a very bad fracture, and they got very good results.

[Testimony of Oliver Whitehead, for Plaintiff.]

OLIVER WHITEHEAD, being first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

At about the hour of nine o'clock in the morning

(Testimony of Oliver Whitehead.)

of November 18th, 1912, I was engineer of passenger train No. 238 from Butte to Great Falls on the Great Northern Railway. The general direction in which the train was running was east. I was locomotive engineer, on the right-hand side of the cab, looking the way the engine was going. I was looking forward during the entire time the engine was running. My eye was on the track ahead as far as the eye would reach. For the first half mile out of Basin east, the track is almost in a straight line. Then you come into curves, and it is mostly curves from there to Boulder. I know where the tunnel is east of Basin. On passenger and freight trains I have been running on that track as an engineer about eighteen years.

I couldn't say just exactly when the work of relining the tunnel was commenced. I think it was in May or June, 1912, about six months before November 28th, I should judge. I don't know what crew of men they had doing the work. The town of Basin is the nearest town west of the tunnel, and the nearest point east is Fuller. Fuller is very near a mile east of the tunnel. I would pass there pretty nearly every day—one day going east, and the next day going west.

I have indicated on Plaintiff's Exhibit 7 with a "C," the point where I would say the push-car was after the accident, right about where I have marked a "C." I took the hand-car with me a-ways [43—18] before it went off into the ditch. I would say I struck the hand-car around here somewhere, where

(Testimony of Oliver Whitehead.)

I have put an "S." After the hand-car had been thrown clear it was lying on the right-hand side as you look east, and the man was on the right-hand side as you look east also, right in here close to that rock, within a few feet of the point which you marked "M." The man was about six feet from the track when he was struck, if I remember rightly. He was by the car. He was just knocked down probably four or five feet—no greater distance.

Cross-examination.

We left Basin late, possibly four minutes late. We were running, I should judge, thirty to thirty-five miles an hour. When I came to this curve I set four, possibly five pounds of air, or what is known among engine men, as a service application, to brace the train for the curve, that is, to make the train ride easy. I was looking ahead as I was going around this curve. In operating a train it is very seldom that I take my eyes off of the track. I would do it to work injectors, but not to set the air. I would set the air by sound. When I blow the whistle, I don't take my eyes off the track, but keep my eyes up the track and blow the whistle without taking my eyes off the track. When I got into the curve just after bracing the train for the curve, I looked ahead as I got a view around the curve and I saw that there were two men throwing baggage off the push-car, and the push-car was crosswise of the track, so that if the two wheels had been lifted up it would have rolled off into the ditch. It would have rolled off on my right-hand side, not on the

(Testimony of Oliver Whitehead.)

fireman's side. As I came around the curve, when I first saw these men, they were throwing this stuff off. There were four coaches to that train. I saw the men as soon as I could see them.

Redirect Examination.

I saw them as soon as I could see them; that is, as soon as they were visible across the curve from where I was on the track. [44—19]

The foregoing exhibits, numbered one to nine, both inclusive, were offered and received in evidence without objection, and are, and each of them is, by this reference, made a part of this Bill of Exceptions.

The foregoing sets forth all of the evidence introduced by the plaintiff.

Thereupon the plaintiff rested.

Thereupon, at the close of the plaintiff's case, the defendant moved the Court for a judgment of nonsuit and dismissal, upon the merits, as follows:

[Motion for Judgment of Nonsuit and Dismissal.]

Now, at the close of the plaintiff's case, comes the defendant, Great Northern Railway Company, and moves the Court for a judgment of nonsuit and dismissal, pursuant to the rules of the Court, upon the merits, for the reasons and upon the grounds following:

1. The facts disclosed by the evidence introduced by the plaintiff do not constitute facts sufficient to constitute a cause of action in favor of the plaintiff or against the defendant.

2. The facts disclosed by the evidence introduced

by the plaintiff show that the plaintiff was guilty of negligence on his own part, contributing proximately to cause his injury and damage.

3. According to the uncontradicted evidence the plaintiff was using the car referred to in the testimony, without right, along the defendant's track, and was a trespasser upon defendant's track in the use of the said push-car. The evidences does not show any consent or knowledge on the part of the railway company relating to the use of this car, or any authority from the railway company to use this car, but at most the evidence discloses merely a statement on the part of the plaintiff that during the two weeks that he was there, he saw these push-cars used for some purpose, but there is no evidence of any authority on the part of anyone representing the railway company, authorizing the use of this push-car, and no custom has been shown, and if one had been shown, it would have been an unlawful custom, which, [45—20] therefore, could not have increased the duties imposed by law upon the railway company, for, according to his own testimony, it would be a custom to use the track in a manner that would imperil the safety of trains. The most, therefore, which could be contended, would be a duty on the part of the railway company to the plaintiff not wilfully or wantonly to injure him, and not to fail to exercise reasonable care to avoid injuring him, after discovering his presence and peril, but the uncontradicted evidence shows that the defendant did not wilfully or wantonly injure the plaintiff, and no act of negligence or failure to use care after

discovering his presence and peril has been shown; in this regard, as regards the speed of the train, the only testimony is by the plaintiff to the effect that when he was looking up the track at the train, he did not see it check its speed, but manifestly a person in that situation could not tell whether or not there had been any change in the speed of the train; another ground of negligence relates to the whistling, but the proof shows that the man knew of the approach of the train when it was five hundred feet away, so that there was no necessity of giving him any further warning, for, as the only object of the whistle would be to give a warning of the approach of the train, knowledge otherwise gained by the plaintiff would dispense with the necessity of giving him any warning. Moreover, the uncontradicted evidence shows that the engineer, on looking out, saw the plaintiff at the first opportunity, and the evidence does not show that he, thereafter, omitted to do anything which could have avoided an injury to the plaintiff. The whole case developed by the plaintiff shows merely that the engineer saw the plaintiff at the first opportunity, and thereafter struck the car, which car struck the plaintiff.

4. According to the uncontradicted evidence, the plaintiff was using the push-car without right along the defendant's track, and was a trespasser upon the defendant's track in the use of the push-car, and in the use of the push-car, he himself admits that he was necessarily imperiling the safety of any train which might proceed over [46—21] that track. In taking that course, therefore, of trespassing upon

the defendant's property, and voluntarily and knowingly imperiling, as he says, the safety of trains, the law does not throw around him a protection while he is engaged in that unlawful act, nor impose upon the defendant any duty of care towards him, but imposes at most only the duty not wilfully or wantonly to injure him, and the proof does not show any wilful or wanton injury.

5. The uncontradicted evidences discloses that it was the plaintiff's own contributing fault and carelessness which contributed proximately to cause the injury. In the first place, he was guilty of contributory negligence in using the track at all, in that the use of the track by him was unnecessary, and he knew that if a train came around the curve while he was operating the push-car in the manner he did operate it, the train and the push-car might collide, and the train and the push-car might both be wrecked, imperiling the safety of the train and the passengers. He did not have any flag out, as would be required by employees, and cannot, in trespassing be excused for using less care for his own safety and the safety of the passengers, than would be required by an employee rightfully on the track. In the second place, the evidence shows that he stood on the track, with knowledge of the approach of the oncoming train. In so far as he seeks to excuse this by showing that he was engaged in trying to save the train, this act on his part would be simply an act done by him to avoid the consequences of his own negligence, and to avoid a cause of action arising against him in favor of any persons on the train to

(Testimony of H. C. Ward.)

recover damages sustained by them in the event of a derailment, and acts of his, thus performed to avoid the consequences of his own negligence, cannot constitute a cause of action in his favor, or impose a duty of care to him on the part of the railway company, or excuse or weaken his contributory negligence in the use of the track at all, as a cause of his injury. [47—22]

The COURT.—I think the main question here is whether there was any opportunity on the part of the railway company to avoid the injury, after the plaintiff was first discovered in a position of peril on the track. The motion is denied.

To which ruling of the Court, in overruling said motion, the defendant by its counsel then and there duly excepted; which said exception was then and there duly noted and allowed. [48—23]

[Testimony of H. C. Ward, for Defendant.]

H. C. WARD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I reside in Boulder and know the plaintiff in this action. He was brought to the hospital at Boulder on a stretcher, with a broken leg. I helped attend him and bandage him and make him as comfortable as possible. I think his leg was dressed right away—perhaps within an hour after his arrival. He was at the hospital about twelve days. His leg was dressed while he was there at least once a day, and part of the time more than once a day. The occasion of dressing it so often was that he removed

(Testimony of H. C. Ward.)

the bandages himself. I believe he assigned as the reason the pain he was suffering in his leg. At times he seemed to stand pain first rate. I was with him all the time. I talked to him, but I never finally succeeded in getting him to stop removing the bandages. I remember a conversation with him there at Boulder, in which he said that the man who came with him on the push-car wanted to get a rig, and he didn't want to get one, for the reason that it would cost too much. He said it would cost two or three dollars, something like that.

Cross-examination.

I don't remember whether he said he had any money. I don't think he did say that. I think he had some cash with him when he came to Boulder. I don't remember the amount. To my notion the man was insane. I have seen a good many insane men. According to my best judgment he was insane, and he certainly acted like an insane man, but at times he appeared to become all right, and at other times he appeared perfectly insane. In fact, it was decided among those people there that the best thing to do with him was to send him to an insane asylum. I took him to Butte and left him in the St. James Hospital. He didn't make any particular talk while on his trip to Butte. When his leg was being set he said it pained a whole lot, but he didn't make any particular outcry. I wouldn't attempt to say exactly how many times the leg was dressed, but somewhere in [49—24] the neighborhood of five or six times while he was there. He

(Testimony of H. C. Ward.)

had me pretty well convinced all the time that he was insane from the very first moment he got there. The county commissioners declined to send him to the Insane Asylum at Warm Springs.

[Testimony of S. McPherson, for Defendant.]

S. McPHERSON, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am a passenger conductor on the Great Northern Railway, and was conductor on Train No. 238 out of Butte on November 28th, 1912, from Butte through Basin to Great Falls. I recall the accident to the plaintiff in this case. I have been a freight or passenger conductor for about twenty-three years. When an engineer is running a passenger train, say twenty-five miles an hour, and he comes to a curve, he makes an application of air. I cannot tell exactly what he would set, but he would set enough to straighten his train out, and to relieve the train from giving a jerk or preventing it from hitting the outside rail. It is what we call an application to stiffen the train out. That is done by setting the air on every car on the train. That has the effect of straightening the train out; taking all the slack out of it so that you don't get a jerk. If you don't do that in approaching a curve the wheels will hit the outside rail and bat back and forth from one rail to the other.

That morning at the scene of the accident it was a

(Testimony of S. McPherson.)

snowy, sleety morning. I can't tell very well how fast we were going as we went into that curve. I think we left Basin about three minutes late. I think we were due out of there at 8:47. I didn't notice particularly any car after the accident, but I picked the man up. The car wasn't a hand-car—it was what we call a push-car. The man was on the engineer's side—that would be the right-hand side, looking east; that is, in the direction of Great Falls. That was where I found him. I didn't pay any particular attention to the [50—25] hand-car and just wanted to get the man picked up and get him in the baggage-car and move on.

I was working my train out of Basin and was taking up my transportation, and as soon as the train stopped I looked ahead and couldn't see anything, and then I looked back at the rear and saw my flagman going back, and I looked back and saw a man lying on the ground and another man trying to hold him up. I picked up the injured man and put him in the baggage-car and took him to Boulder, and I phoned from the tunnel for a doctor to be at the depot at Boulder, and at Boulder I got the baggage wagon there to take him to the hospital. Railroad employees are strictly prohibited from using push-cars; the only way you can get hold of one is to get an order from the Superintendent or the Chief Train Dispatcher to put it on the track, and then the man using it must always work with a flag. If he is on a level track he wouldn't go back so far with his flag, but if he is on a mountain, you have got to

(Testimony of S. McPherson.)

go back a mile or two miles and a half, just according to the direction you have got to go. This is the rule in using a push-car. A push-car is a good bit heavier than a hand-car. A push-car is quite a heavy car and it will take two pretty good men to put a push-car on. If the railroad company would catch one of its section men shoving a hand-car around a curve without having a flag out for protection, they would discharge him.

Cross-examination.

After the train stopped I looked back to see if my flagman had gone back. I should judge that the injured man was then half a car-length or more to the rear of my train, and about six to ten feet from the track. I couldn't state from what point on the train I looked back. I couldn't tell you the exact distance the man was from the rear of the train. It would probably be a car-length—somewhere along there. I don't notice those things. I wanted to get my flagman back and protect my train. It was a sleety day, snowing. [51—26] I don't remember that it was sleeting in Butte when I left. I don't remember whether it was sleeting in Helena when I got there. I don't remember whether there were the same weather conditions throughout that trip. I don't remember that it was Thanksgiving Day. I do remember getting off and that it was snowing. It was snowing at Basin and it was snowing when we picked the man up who was injured.

I don't remember the rocks shown in these pictures. That picture looks like the curve, but I can't

(Testimony of S. McPherson.)

recognize where I picked up the man. I can't say that he was picked up about here between this telegraph pole and that rock, or closer to that rock. My brakeman, Bert Gillis, and the express messenger helped me pick the man up. I couldn't say whether the engineer helped me or not. The engineer backed up to where the man was lying. I couldn't say that the baggage-car was backed up right opposite him. We aim to get back as quickly as we can. I don't know that the man's leg was broken. I put a quilt on him, but in looking at him and when we lifted him I thought I heard his bones grind, and I put something up to keep the weight off his knee. I can't tell you anything more about it.

Redirect Examination.

I should think the train stopped about a train-length west of bridge 122.

Recross-examination.

I cannot identify those photographs. There is a whole lot of those tracks that look alike. Those photographs don't help me.

[Testimony of Oliver Whitehead, for Defendant.]

OLIVER WHITEHEAD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

We left Basin about four minutes late on Train No. 238 on the morning in question. The train was running at a speed of about thirty-five or forty miles an hour, and I came to this curve and I braced the

(Testimony of Oliver Whitehead.)

train. I did what they call bracing the train for a curve [52—27] and looked ahead—looked across the curve. It was snowing at the time and I saw a couple of men there with a push-car crosswise of the track, unloading the baggage. In bracing the train I set four or five pounds of air, and brought the brake-shoes up snugly to the wheels, to tighten the coaches and to brace the train so that they will ride smoothly. If I hadn't braced the train, the train would run into the curve and throw itself back and forth. By applying four or five pounds of air you brace the train, causing it to ride easy.

I was looking across the curve and I saw two men trying to throw off, or throwing off grips from a push-car. The car was straddling the rail and I just turned the handle of the air-brake right back the rest of the way and threw the air into the train, applying all the power I could get. We were then about seventeen rail-lengths from where he was. A rail is about thirty feet, I think. I have tried to check those measurements up recently on the ground with you last Sunday, checking the distance up by rail-lengths. After I had set the air to brace my train, I didn't thereafter release it. Then when I saw the man I did all I could to stop the train. I couldn't get an emergency application of the air under those conditions. I just got the full braking power with the air in the condition it is in after a service application has been made. It is pretty hard to explain why you can't get an emergency brake after putting on four or five pounds of air.

(Testimony of Oliver Whitehead.)

If the train line and auxiliaries are charged perfectly equal, then when you apply the brake with full force you bring it into the emergency. There is a cylinder valve in the triple valve that brings the air out of the train line into the brake cylinder, as well as the air out of the auxiliary reservoir just under each car, into the brake cylinder. Each car has its own braking power, but if you have thrown off four or five pounds, you can't get an emergency effect until after you have thrown the engineer's valve into full release again. It would be necessary to throw the engineer's valve into full release again and keep it there until the auxiliary [53—28] and the train line pressure is again equalized, and then, if you made another application you can get an emergency application, but if you have made a four or five pound application, you disturb and displace the emergency application, so that you can't get the emergency application until you have first released the brakes and recharged the air. Before you can get an emergency application after setting four or five pounds, you will have to put your engineer's valve in full release, and it would probably take four seconds to recharge the air. I should say as I entered that curve I was going thirty-five or forty miles an hour. Assuming that the train was going thirty-five or forty miles an hour down a one per cent grade, and that the train contained four cars, I think it would probably take fourteen hundred feet to stop the train by an emergency application. As regards the condition of the rails, it was

(Testimony of Oliver Whitehead.)

snowy and wet. There was a heavy snow and a wind from the south. With a wet rail and with wet brake-shoes, you can't get as good braking pressure. Under those conditions the wheels don't bear on the brake and the brake-shoes don't wrap on the wheels so hard as when there isn't any snow there. When about four or five rail-lengths from the man I gave a long stock whistle—just rip, rip, rip, rip (pulling with his arm); it is an alarm for stock. The man **was then** in the middle of the track. Then as we drifted down again I yelled at him like an Indian to get off the track—to get out of the way, yelled just as loud as I could holler. I did all I could and sat there and observed. He seemed startled, and when I came up a little closer to him I yelled at him again, and he runs around on the east side of the car. I was going east. The car was straddle of the track, and he runs around on the east side of the car and the pilot comes around and hits the car against him. There was no way I could have avoided striking the car. If he had run on the west side of the car, which he could have done quite as easy, he would have been in the clear and the car would not have been thrown against him. I think the engine stopped just at the west end of bridge 122. An engine carries with it a speedometer to [54—29] indicate the speed at which it is going from time to time, and a tape in the engine records the speed from time to time. I produce here that part of the tape which shows the speed of the engine as it left Basin and thereafter. I have marked with the letters “Bs” the stop that

(Testimony of Oliver Whitehead.)

was made at Basin. I have marked the point where we left at Butte. The next station from Butte to the east is nine miles and the tape shows the stop at Woodville. You count nine quadrangles. Woodville I have marked with a "W." The next stop is Trask about four miles to the east, but we didn't stop there. The next stop that morning was Elk Park. nine miles. We sometimes stop at Wilder. Evidently we didn't that morning. That (the next stop) is eight miles. The tape shows we didn't stop at Wilder that morning. We stopped at Bernice, which I have marked "B," which is eight miles further. Then we run down here four quadrangles, or four miles, to Basin, which I have marked "Bs." Leaving Basin the maximum speed which we reached before we stopped was forty-five miles an hour. The bottom line on the tape represents zero. The next line represents a speed of five miles an hour, and the next, ten miles an hour, and the next, fifteen miles an hour, the next, twenty. The space between each heavy line represents an increase in speed of ten miles an hour, and the space between each dotted line and the next heavy line represents five miles an hour. In approaching that curve we were going almost forty-five miles an hour, and I lost about four miles an hour according to this tape, in going around that curve. You see it goes right down here from the dotted line for forty-five miles an hour pretty near to the heavy line for forty miles an hour. You see the tape shows that when I made an application for this curve it reduced the speed about four miles

(Testimony of Oliver Whitehead.)

an hour, and when I saw this man and a car I gave her all of it, and it shows it came right down to a stop.

Whereupon said tape was marked Defendant's Exhibit 10. This exhibit 10 is the tape used on the engine that left Great Falls on Train No. 235 on November 27th, and returned from Butte to Great Falls as the engine on Train 238 on November 28th. And the same was marked exhibit 10 and was offered and received in evidence, and is by this reference made a part of this bill of exceptions. [55—30]

You have now extracted or torn from the tape only that part relating to the road from Butte to some point beyond Basin, including the scene of the accident.

There was nothing that I could have done that I did not do to avoid injuring this man. The other man came back west of the car and was about twelve feet from the track, I should judge. He left the car about the time I hollered at them. I had no knowledge of any use of these tracks by push-cars. That is the first push-car with baggage on it that I saw during the time they were working there.

Cross-examination.

I never saw any push-cars on that track with anything else on them. I never saw any push-cars with supplies for contractors on them. I don't know as to the number of men used in relining the tunnels on that line. I know they were working on the tunnels during the summer and fall of 1912, but I know nothing about the number of men working. I know

(Testimony of Oliver Whitehead.)

they were working at the tunnel relining it. I should say we struck the car about half a mile from the tunnel. I do not know that men got off at Basin to go to that tunnel. I know we stopped several times each way at that tunnel to deliver laborers with baggage and bedding at Tunnel No. 7 at the east end. I should judge we ran twelve or fifteen rail-lengths after we struck the car. I think I could have stopped quicker after striking the car, but everything was in the clear and I wanted to take the charge off the train in stopping, so I released and made a second application to stop. I released just after striking the man, and the train was slowing at the time, and I just released for about two seconds—enough to get a partial or full release.

If that train was going thirty-five miles an hour down a one per cent grade with that engine in that condition that morning, I think it would take in the neighborhood of fourteen hundred feet to stop it with four cars. We had four cars that morning. I released and recharged the train after hitting the man to avoid the jar on [56—31] the train, and ran somewhere in the neighborhood of three hundred and sixty feet beyond the man, and I ran some five hundred and ten feet before I got to him. That would make it that I stopped in nine hundred and seventy feet after I first saw the man, and in making that stop I had made a partial release after seeing the man. In connection with my statement that it would take fourteen hundred feet to stop the train, you must remember that I had slowed on this curve

(Testimony of Oliver Whitehead.)

when I made the application to brace the train. I had slowed the train down about five miles an hour—the speed tape shows about four. The speed sheet shows that I was running about forty-five miles an hour before I came to this curve. Then I took some of the momentum out of the train with the application of the air-brake and thereby reduced it to forty miles an hour, according to the speed-sheet. I should say I was going about thirty-five miles an hour, but the speed-sheet would be more accurate, if it is an absolutely correct machine. I couldn't say that it is a correct machine. This tunnel is about two miles from Basin. The speed-sheet shows that we stopped about two miles from Basin. The speed-sheet shows that starting up from Basin I speeded up to forty-five miles an hour. That would be about a mile and a half out of Basin, or a mile and three-quarters east of Basin, and when I seen these men with the car the speed-sheet shows that I lost four miles an hour for the curve gradually, and then when I saw these men with the car it comes right down to a stop. In making the stop the speed-sheet gives me right close to a quarter of a mile. I have marked the point of the stop with an "X."

It was snowing that day. If I remember right, it was snowing when we left Butte. I do not think it was snowing in Helena. It wasn't a light freezing snow, but a wet heavy snow, just a fresh snowfall. When I commenced to holler to the men I should judge I was about sixty or seventy feet from them. Harmon could have got-

(Testimony of Oliver Whitehead.)

ten out of the way if he hadn't held on to the car too long. He wasn't struck [57—32] by the engine. He wasn't holding the push-car when he got hurt. He just simply ran right around the east side of the push-car. I don't know how close he walked to the push-car. He ran in front of the push-car on the east side, as I was going east. He just seemed to be standing there saying something to the other man. It looked to me as though he was talking to the other man to get him to help him off with the car. He was gesticulating to him. I don't know what he said. The other man had gone to a point of safety, and Harmon was still standing in the middle of the track throwing off the baggage. He seemed to be simply standing there when I yelled to him to get out of the way. I yelled at him like an Indian. He did not then have the car off the track. The car was straddle of the track, crosswise of the track. After the car was hit it was all on the right-hand side, looking in the direction we were going. When we stopped I think Harmon was just a little behind the rear car of the train. In other words, it seemed that we had just about completely passed the man, when the train stopped. It is not a fact that a train going about thirty-five miles an hour on that trip could have been stopped by using an emergency application in three hundred and ninety feet, and I didn't have the emergency. After making this application to brace the train, I couldn't get the emergency without recharging the air pressure in the auxiliary reservoir and in the train line, which are

(Testimony of Oliver Whitehead.)

separated by triple valves, and when you reduce the pressure in the train line, the triple valve so operates so as to allow the air to come out of the auxiliary in each coach and in the brake cylinder. But in making a sudden stop you just pull the engineer's valve back quickly, make a quick strong application, and you get what you call an emergency. Then you get the air pressure out of the train line as well as out of the auxiliary reservoir directly into the brake cylinder. An emergency application just shakes the train all up and everybody on it. This was not done in this instance, for the reason that after making the application to slow for the curve, I couldn't [58—33] get the emergency application. I understand the construction of air-brakes fairly well. The brake works by a throwing off of the pressure in the train line. When you take the pressure out of the train line, it throws the auxiliary air pressure into the brake cylinders and sets the brakes. If there were no air set in the train line the brakes would all be set. There is air stored in each auxiliary reservoir under each car, and it is the escape of this air from each auxiliary reservoir into the brake cylinder, caused by the reduction in the pressure of the air in the train line, which causes the brakes to set. The air-brakes were in good condition that day. There is no use in reversing the engine. I could have reversed the engine. By reversing the engine that would have added to the distance in which the train would have stopped. You understand that a modern engine is equipped with a high-power brake,

(Testimony of Oliver Whitehead.)

and when you throw on the air and pull your reverse lever back, you are going to lock the wheels, and they are going to slip. They don't turn, they slide, and in place of getting a large area surface to rub on the driver-brake, you get just a little point on the driver and that skids along on the rail, and on a wet rail especially no good could be accomplished by reversing the engine. Yes, sir, it also hurts the wheels on the engine. This is not what is called dynamiting a train. Dynamiting a train is the emergency application of the air-brake. There is no man, running one of these modern engines, equipped with high-power driving brakes, that does not know that if you reverse the engine it would be useless and would result practically in a loss of the braking power on the brakes of the engine. I don't think, with that train going thirty-five miles an hour, on a one per cent grade, and with everything in good condition, it could be stopped inside of four hundred feet, no, sir. I think the grade there is more than a one per cent grade. I don't know what it is. I should judge I was sixty or sixty-five feet possibly, maybe ninety feet from the man, I wouldn't say for certain, when I blew the stock whistle. I was watching him [59—34] and seeing the outcome of the affair. Possibly I was ninety to one hundred feet, maybe a little more, maybe one hundred and twenty feet when I first blew the stock whistle. If I could have had the emergency application under perfect conditions, of course it would set everybody up in the train, but by an emergency application under perfect condi-

(Testimony of Oliver Whitehead.)

tions, it is hard to say within what distance the train could be stopped. I have never had to do it and therefore I don't know. I have never seen it done, and I have never been on a passenger train when the emergency was applied. If we should apply the full emergency and shake everybody up in the train I should judge, on a one per cent grade, under those conditions, and assuming that you could get the emergency application, and that the wheels in the train didn't slide, that you ought to stop in possibly eight hundred or nine hundred feet. That is my minimum supposition. In my own case I have never seen it done, and have never been on a train when it was done, but you couldn't stop a train in less than eight or nine hundred feet.

Redirect Examination.

Other than the stock whistle and my yelling at the man like an Indian to get off the track when I was three or four train-lengths from him, I gave him no further warning.

[Testimony of E. L. Morris, for Defendant.]

E. L. MORRIS, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am an express messenger in the service of the Great Northern Express Company, and was express messenger on Train No. 238 running past Basin on the morning of November 28th of last year. I know the plaintiff by sight. I remember the train coming in contact with a push-car on that day, east of Basin.

(Testimony of E. L. Morris.)

We were leaving Basin almost on time and came down to a curve, I presume a mile east of Basin. I heard the engine whistle a stock whistle, which consists [60—35] of several short blasts; it is for cattle or something on the track. As soon as the whistle was blown I went to the door, and the engineer had struck the push-car before I got there. I think the stock whistle was blown about two train-lengths before the car was struck. I didn't see the push-car. I saw the man after he was hurt. When I looked out the door of my car all I saw was a broken push-car. I can't say for sure the exact distance that that whistle was blown before the car was hit. I judge it in this way. There was a curve there and the stock whistle was blown around the curve. I couldn't say just the exact distance, but I presume from the time he whistled to the time I got to the door, the engineer ran two train-lengths at least. The train stopped near the west end of the bridge. The weather that day was a kind of sleety, snowy morning, and the wind was blowing.

Cross-examination.

I helped pick the man up. We had to back up to get him. I think we backed up two train-lengths. We had a buffet-car, day coach, smoker, baggage-car and engine and tender. Those cars are sixty or seventy feet long. I couldn't tell from those pictures where the man was lying. I recognize bridge 122 in these photos. We did not cross bridge 122 to pick the man up. I think we backed about two train-lengths, in the neighborhood of twice the length of the train, I

(Testimony of E. L. Morris.)

couldn't say exactly. By train-length, I do not include the length of the engine. They backed up to the man so that my baggage-car door was opposite to him. Yes, sir, when the train stopped I would say that the rear coach was about a quarter of a train-length from the man, something like three hundred and sixty or two hundred and forty feet, yes, sir. The man was found on my right-hand side as I looked out. I looked out on the right-hand side of the car as we were going east, and the man was on the same side of the track that I was looking from. The hand-car was on the same side. I cannot tell from the pictures where the man was found. I do not recall that telegraph pole shown in exhibit 7. I cannot tell from that photograph [61—36] where the train was coming from. This occurred about nine o'clock in the morning, something like that. It had been storming in Butte when we left that day. I don't remember whether it was snowing or sleeting in Helena. I couldn't say whether it was freezing weather or very cold. There was no chinook blowing.

Recross-examination.

When I looked out I looked back and I was looking out of the right-hand side door of the car as we were going east.

[Testimony of Bert Gillis, for Defendant.]

BERT GILLIS, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I remember the accident to the plaintiff at Basin

(Testimony of Bert Gillis.)

on November 28th last year. I was then head brakeman on Passenger Train No. 238. We were going about thirty—thirty-five or forty miles an hour before we hit the curve around which the man was hurt. It was snowing a little all that day, and was snowing at the time of the accident. The first thing I noticed I heard a cattle whistle blowing and I started to the front door to see what it was and we were almost stopped when I got out of the door, and I got in the vestibule and got out when we stopped, and when we stopped we were about to bridge 122. I did not see the car or the man until after the accident. The car and the man were on the right-hand side of the track as you go east.

Cross-examination.

The train had gone about one or two train-lengths past the man when it stopped. I would say it was closer to two train-lengths than one. The rear end of the last coach was about a train-length from the man. The engine had passed about two train-lengths. I have not seen those photographs. I am familiar with the country shown in these photographs. I don't remember that rock there. I remember that curve, but I don't remember exactly how long it is. The man was [62—37] found back from the bridge. I cannot tell on the photographs just where the man was found. I think the train was going thirty-five or forty miles an hour when the stock whistle was blown. I know when the stock whistle was blown he began to slow down a little. He was then going about thirty miles an hour.

(Testimony of Bert Gillis.)

I was in the smoker, about two cars back from the engine. I should say the train ran three or four train-lengths after the stock whistle was blown, something over eight or nine hundred feet—something like five train-lengths, about eleven hundred feet after the stock whistle was blown.

[Testimony of Fred Melvin, for Defendant.]

FRED MELVIN, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

On the 28th of November last I was a flagman on Butte Division on Passenger Train No. 238. I remember the accident happening by the collision of a push-car after the train left Basin on that day. I heard the stock whistle blown, and I got out on the platform and saw there was somebody hurt, but I didn't see them until we passed. I think we had passed them before we got out or had time to get out. It was a snowing, sleety day, quite a storm. The engine stopped somewhere east of the bridge. Yes, sir, I think it was east of the bridge. This fact was impressed on my mind because I remember that I went through the bridge when I went back from the head end of the buffet-car, which was at the rear of the train, to give them the signal to back up. I think I then went between the bridge and the buffet-car. I saw the injured man as we backed past him. He was on the right-hand side as you go east.

Cross-examination.

I heard the stock whistle. I should say the train

(Testimony of Fred Melvin.)

ran ten telegraph poles after the stock whistle; I don't know the distance between telegraph poles. I should judge there was about seventy-five feet between them. I should say the train stopped about three or four train-lengths from where the man was lying. I would not say it [63—38] was more than three, possibly three. That is, the engine was three train-lengths away, according to my judgment. I couldn't say how long the stock whistle blew; it was a good stock whistle, several blasts. I do not know just where the hand-car was. I think there were pieces of it lying around there, as we went by. It was broken up pretty bad. I didn't see it before it was broken. I don't know whether all the pieces were on one side of the track. It was broken up pretty bad.

[Testimony of Robert L. Coburn, for Defendant.]

ROBERT L. COBURN, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

On the 28th of November last I was a locomotive fireman in the employ of the defendant on passenger train No. 238, and remember the accident to the plaintiff shortly after leaving Basin on that day. As I left Basin I rang the bell as we pulled out of Basin. I ordinarily rode the seat box and would watch the track ahead, and whenever I would have to put in a fire I would always try to do this when I would get on a right-hand curve, where the engineer could see ahead, and I would then get down and put in a fire,

(Testimony of Robert L. Coburn.)

because on a right-hand curve the engineer can see ahead and I can't, so I aim to put in a fire always on leaving Basin on this first right-hand curve. Just as we went around the right-hand curve, before we came in sight of that push-car, I was putting in a fire. I stopped putting in a fire, because I heard the engineer put his brake valve in what is known as the big hole, and he started blowing the stock whistle. By putting the brake valve into the big hole I mean that he is trying to make a stop as quickly as possible. I then got up on the seat box and looked out of the cab window ahead. I seen this fellow working on the hand-car. I cannot say for sure whether he was throwing baggage off or whether he was putting the hand-car off. He had been putting the hand-car off, because it was partly off on the right-hand side. I remember that after the stock whistle was blown and before [64—39] the car was struck, the engineer yelled at the man that he was in danger. I do not remember what he said. I think he said either, "Lookout," or "Get away from the track," but I know he yelled at him. I was sitting on the box ringing the bell. The car was thrown on the right-hand side as you go east. That would be the engineer's side, and the man was on the right-hand side. There was a light snow and a little wind blowing. We stopped just before we got to the bridge. The depot at Basin is probably ten car-lengths from bridge 125, the bridge west of Basin.

Cross-examination.

The first thing that attracted my attention was

(Testimony of Robert L. Coburn.)

when I heard the engineer applying the air-brake. I could see he was trying to make as quick a stop as possible. I would say the train probably stopped in five or six hundred feet after that. After he hit the hand-car he released a little and then made a stop. I would say that the stock whistle was blown when he was between four and five hundred feet from the car. He had set the brakes before he blew the stock whistle. Just as quick as he could set the brakes he whistled. Of course it doesn't take any time to place the brake valve in the quick stop. You just move the brake valve is all. I heard the air and I could tell he was stopping and then I heard the whistle. It would be any way eight or ten seconds. Now, let's see; I guess it would not be that much either. No, it wouldn't be that much. He just set the brake and reached up and whistled. It didn't take any more time than to do that—set the brakes and whistle. It was done as quickly as a man could do it. The brake valve would be a little handier to set than the whistle would be to blow, because the whistle is out on the side a little bit and he reaches up for it. The engineer didn't shut off steam—he didn't have any steam on at the time. He was rolling down hill. Where a train will roll, there is no use to use steam.

Whereupon it was stipulated between the parties that neither of the parties had been able to find the man who was with the plaintiff [65—40] at the time of his injury, and that each had used reasonable efforts to locate him.

[Testimony of Dr. I. A. Leighton, for Defendant.]

Dr. I. A. LEIGHTON, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am a physician residing at Boulder. I have been practicing medicine there for a little over twenty-eight years. I remember a man coming to Boulder on the 28th day of November last who had been injured near Basin. He was the plaintiff in this case. He was in Dr. Ward's Hospital under my charge, if my memory serves me correctly, about eleven days. The injury was a fracture of the lower third of the left femur; no other injuries to speak of. He claimed some injury to his back, but I could find none. He claimed some injury to his right shoulder, but I could find none. There were some small bruises on the hand and on the arm and also on the face, but they were very slight. I reduced the fracture and put it in splints and made him as comfortable as possible in the hospital, with a good nurse. With a fracture such as he sustained, if he was a good patient and had good careful treatment, he ought to have pretty fair use of his leg in five or six weeks ordinarily, and there would be no permanent injury resulting from that fracture if everything was looked after properly. I cannot say how many times I had to put on splints and dresses. He would deliberately tear the bandages off. I couldn't state how often, but he tore the bandages off a good many times, and so often that we called aside our regular nurse, Mrs. Ward,

(Testimony of Dr. I. A. Leighton.)

and called in Dr. Ward's brother, in order to try and persuade him to watch over him so that he would let the dressings alone and let the splints alone, so that we could keep the fractures in their proper places. He assigned no reason for tearing off those bandages. He begged my pardon every time I would go there. He complained of pain in his back and also a pain in his shoulder. He did not complain of the pain in his leg as a reason for taking off the bandages. He didn't stand pain very [66—41] well—that is, he complained a great deal. He was under my care about eleven days; it might have been ten or twelve days. I don't recall the exact number of times that I reset the leg, but it was several times. It was a daily occurrence—sometimes two or three times a day. He did not complain much of pain in re-setting his leg. Of course I gave him an anesthetic the first time, but none after that. After that he stood the pain of re-setting very well.

Cross-examination.

The man was not unconscious when I first saw him. He was then at the hospital. He seemed to be all right, because he answered all the questions I asked him and told me where he was from and answered all my questions. Dr. Ward, the railway's surgeon was in the west and I was looking after his work for him. I am not the company's surgeon. The leg was set by me daily, with the exception of the first time, when I of course gave him an anesthetic. He stood the pain of re-setting the leg well.

(Testimony of Dr. I. A. Leighton.)

Redirect Examination.

If he had responded properly to treatment and had been a good patient and let this dressing and the splints alone on the limb, I don't believe he would have had any shortening, if there is any. I think he would have had a good leg.

[Testimony of Dr. A. L. Ward, for Defendant.]

Dr. A. L. WARD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am a physician and surgeon residing at Boulder—have been such for thirteen years. I remember seeing the plaintiff in this case at my hospital in Boulder about the 7th of December. I saw him with Dr. Leighton. I know he tore the bandages off his leg and behaved badly as a patient. That happened every day while I was there. I saw him for four days. We dismissed him from the hospital. I should say a man of his age, forty-five years, in good health, would recover from [67—42] a fracture of the femur in seven or eight weeks. A fracture of the femur would not necessarily result in a shortening of the bone. If this man had properly responded to treatment, considering the injury which he received, there would not necessarily have been a shortening of his leg. He stood pain very well. He made no complaint to me of pain as the cause for removing his bandages.

Cross-examination.

Dr. Leighton and myself suggested that there

(Testimony of Dr. A. L. Ward.)

should be an insanity commission on this man to determine whether he should be sent to the Insane Asylum or not. I regarded him as an insane man, and so did Dr. Leighton. He certainly acted to me like an insane man. I have had experience with insane people. He seemed to me to be insane. I think he was insane. Dr. Leighton and I reported to the Court that we considered him insane, but the Chairman of the Board of County Commissioners, who sat in the case, after talking with him, did not feel justified in confining him. We thought he was insane and so reported. He was tearing the bandages off his leg and during the days and nights that he was in the hospital he would oftentimes shout at the top of his voice. He didn't groan, but he simply talked about something not relating to his injury. He would shout at the top of his voice, and when in conversation he would talk at the top of his voice and shout at us, using profane language. He did not do this continuously, but just at times. He was apparently insane then, with lucid intervals. That is the way it seemed to me. I never kept track of these insane intervals. Sometimes these insane intervals would last for an hour and sometimes a shorter time.

The chances of a full recovery of a fracture of the thigh grow less as the age of the patient increases. A young man of twenty or thirty, other things being equal, has a better chance of recovery than a man of forty or fifty. In a child the recovery is usually absolutely complete and in a shorter period of time. In a man of fifty or sixty years of age, the recovery

(Testimony of Dr. A. L. Ward.)

is very often as complete, but it requires a longer time. Between sixty or seventy years of age they do recover. The bones unite at any age if properly cared for and the [68—43] conditions are good. I had never seen the man before I started treating him. I have never seen him since until to-day or yesterday.

[Testimony of A. B. Ford, for Defendant.]

A. B. FORD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am master mechanic for the Great Northern Railway Company at Great Falls, and as such have charge of the locomotive engines there for that company for the Butte Division. I have been such master mechanic for eleven years. I understand the use of air-brakes and the means employed in stopping engines and trains. I ran an engine for four years. My work brings me in contact with the working apparatus of things of that sort. I have charge of maintaining them and of instructing the engineers in the handling of the brakes. I am required to be familiar with the brake mechanism and the principles of air-brakes. You lose your brake power when you reverse the engine with the brakes set, for the reason that only a small part of the driver rests on the rail, while the brake-shoe that comes in solid contact with the tire is fourteen inches long. When the engine is reversed and the wheels are locked they will slide, and you would probably have only about three-

(Testimony of A. B. Ford.)

quarters of an inch working surface represented by that part of the tire of the wheels resting on the rail. Hence, reversing the engine would reduce the braking power of the train. This book is a standard textbook on air-brake maintenance and operation. This book shows on page 26, section three, paragraph 32, in regard to the reversing of engines:

32. REVERSING THE ENGINE.—No matter how poor the driver—and tender-brakes are, if they are applied, the engine should NEVER BE REVERSED with the expectation of making a shorter stop than could be made with the brakes alone; reversing the engine under such conditions may cause the brake to lock and slide the drivers, in which case the retarding power of the engine is practically lost. It was proved by actual trial in the Galton-Westinghouse tests in England, and, later, in tests made by Mr. Thomas, Jr., Assistant General Manager of the N. C. & St. L. R. R., that a stop cannot be made in as short a distance with the driver brakes set and the engine reversed as when the brakes alone are used.

The principle of air-brakes is the greater pressure governing the less. There are three pressures of air on a train in connection with the brakes—the train line pressure, the auxiliary reservoir pressure and the main reservoir pressure. When the pump [69—44] starts it pumps air direct to the main reservoir, and the air from the main reservoir goes to the train line and from the train line into the auxiliary reservoir. When all the pressures are on, you

(Testimony of A. B. Ford.)

will have at least seventy pounds in your train line and seventy pounds in your main reservoir and seventy pounds in your auxiliary reservoir; the pressure will be equal. In order to set the brakes you have got to reduce your train line pressure. You do this by exhausting the air in the train line pressure through the engineer's brake valve. That reduces the pressure on one side of your triple valve and this causes the triple valve to operate and the air flows into the brake cylinder and equalizes at whatever pressure is desired. The effect of the air-brake auxiliary reservoir flowing into the brake cylinder is to set the brakes. It is the releasing of the air in the train line that gets the air from the auxiliary reservoir to flow into the brake cylinder, and it is that pressure in the brake cylinder which sets the brakes. (Witness then shows by means of diagrams the physical impossibility of obtaining an emergency application of the air-brake after any service application has once been made until the brake is released, as hereinafter stated, and that, as a matter of mechanics, such emergency could not be obtained.)

There is an air cushion between the piston which gives the emergency and the other piston in the valve. When you reduce the pressure in the train line suddenly this will cause air from the auxiliary reservoir to force the last piston back suddenly, and as the last piston mentioned is forced back suddenly, it causes the first piston, or what may be called the emergency piston, to move back also, opening up other reservoirs and giving the emergency pressure in the brake

(Testimony of A. B. Ford.)

cylinder. But if the air in the train line is slowly released, or is not released to the full extent suddenly, this causes the piston which has been referred to as the piston last mentioned, to move backwards slowly, and the pressure of that piston against the air cushion between the two pistons causes the air in that cushion to escape out of a port in the emergency piston, so that said last [70—45] piston moves up flush with the emergency piston, and the emergency piston cannot reach back far enough to give the emergency effect. When, however, the air in the train line is reduced suddenly to the full extent before any application has been made, the air in what is called the air cushion between the two pistons can not escape through this port fast enough, and hence the last piston never gets flush with the emergency piston, but moves the emergency piston by reason of the air cushion between the two. You can't get an emergency application after a service application has been made, or even started, because the two pistons are then flush together, and it is therefore impossible to open the emergency valve.

The system used by the Great Northern Railway Company is the New York Air-brake System. It is mechanically impossible, with the New York air-brake, to make an emergency application of the air-brake after five pounds, or any application of the air has been made, such as is made when approaching a curve. It is mechanically impossible to do this until you release or re-charge the train line and auxiliary reservoir again, and equalize the pressure. To re-

(Testimony of A. B. Ford.)

charge the train line would probably take ten seconds; to equalize the pressure would take six or seven seconds. It sometimes varies on account of the ports being gummed, or something like that. The flow of air is not quite as free sometimes as at others. But it would take four or five seconds anyway to equalize the air and around ten seconds to re-charge. To do this it would be necessary for the engineer to place his valve in full release and release his brakes. He would move his engineer's valve to what we call the release position. In that position all the ports are open, ready for re-charging. The air will then escape from the brake cylinder and will release the brakes, and the air will flow back through the main reservoir to the auxiliary reservoir. The engineer would then leave his valve in that condition for five or six seconds, and then make whatever application he wanted. He would handle just one lever. One lever does all the work. [71—46]

Q. Calling your attention to this Westinghouse Air-brake book, will you state what that shows as regards the distance within which it is possible to stop trains by the application of the emergency air-brake.

Cross-examination by Plaintiff as to Competency.

The Westinghouse and the New York air-brakes show practically the same braking power. They work on the principle that the brake is set by the reduction of the air. The construction of the Westinghouse and the New York brakes are different, but the principles get the same results.

(Testimony of A. B. Ford.)

Direct Examination (Continued).

If you have four cars on a level track and seventy pounds of air in the train line, you could probably stop a four car train with an emergency application somewhere around seven hundred feet. That would depend on weather conditions and the condition of the rail. I am assuming perfect conditions to stop within seven hundred feet. Imperfect conditions would increase the length of the stop, and wet rails will increase the length of the stop. A dry rail gives you the best braking efficiency. Down grade would increase the length of the stop.

The speed recorder has always been found very accurate. We keep a specialist who looks after that particular item for the Butte Division. He checks off the tapes daily. A tape is put on which will last for the round trip from Great Falls to Butte and return. We put on a four hundred mile tape and it lasts for the round trip. This specialist removes the tape and if it doesn't correspond to the mileage for the district, then he checks up to find if there is anything wrong with these speed recorders. This is done each trip. For those speed recorders we use a very high-grade oil. The system of the Boyer speed recorder which we use is similar to a centrifugal pump. The revolving of the wheel moves the air up and moves the cylinders, which move a pencil up, which represents the speed at which [72—47] the engine is going. The oil is very high grade and expensive. The oil will not freeze above sixty degrees below zero. We have never made tests to see whether

(Testimony of A. B. Ford.)

it will freeze below sixty degrees below zero, but it is guaranteed that it will not freeze above sixty degrees below zero.

Cross-examination.

This train in question, going forty miles an hour, couldn't have been stopped within seven hundred feet. It certainly couldn't have been stopped in a train-length. I have made tests on those matters. If you had made a service application in approaching a curve and had reduced your speed by five miles, why you could put the emergency brake into the emergency position, but you wouldn't get the emergency feature. You would have to release and equalize the pressures and then apply the brake to the emergency point, before you could get the emergency feature. This would probably take five or six seconds. When a train comes into a depot or station it is very rare that anything but a service application is used. You can increase a service application from a five point reduction to any reduction.

Redirect Examination.

When I say that you can increase a service application, you can do so until you get full service application, but a service application doesn't include the emergency pressure.

Defendant rests.

Rebuttal.**[Testimony of Charles P. Harman, for Plaintiff
(Recalled in Rebuttal).]**

CHARLES P. HARMAN, being recalled, testified in rebuttal in his own behalf, as follows:

Direct Examination.

The morning in question was a cold day, a little snow was falling; practically no sleet or snow was on the track—the track was dry. [73—48]

**[Testimony of Albert E. Lynes, for Plaintiff (in
Rebuttal).]**

ALBERT E. LYNES, being first duly sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination.

I have been a locomotive engineer and know the track of the Great Northern Railway Company between Basin and the tunnel east of Basin. I worked on the Great Northern between Clancy and Butte for about four years as locomotive engineer. I know the type of engine used on the Great Northern numbered 1000 to 1007, but I have never run engines of that type. I have never run their passenger trains from Butte to Helena, but I have fired on them. I have had experience with New York air-brakes. If an engineer was running with a passenger train of four cars and a tender, going down a one per cent grade, forty miles an hour, on a dry track, and the engineer's valve was in running position, and the air pumped to its full capacity,

(Testimony of Albert E. Lynes.)

and he got an emergency application of the air-brake, he could stop that train in between two and three hundred feet. With a full service application it ought to be stopped in not to exceed four hundred feet. If the engineer on coming around the curve referred to in the testimony reduced his speed by a service application from forty miles an hour to thirty-five miles an hour, there would be no delay incident to getting a full service application of the air-brakes. It would simply mean moving the same valve or lever further on into the full service application. If an engineer has made a reduction of the air by service application, it would take him four seconds to recharge. It would not exceed four seconds. It would take about three seconds to recharge the train and have a full application. By use of the emergency application the train should be stopped in two hundred feet. I have seen the train of the Great Northern Railroad that runs from Butte to Great Falls stopped, and my statement applies to that train. The grade east of Basin, I think, is about one per cent.

Cross-examination.

It is true that with the New York air-brake you can't get an emergency application after giving a service application. The [74—49] Westinghouse tests show that a train going forty or fifty miles an hour can be stopped in less distance than two hundred feet by the application of the emergency brake, with four cars. (Producing tables and referring to them.) That is shown in test num-

(Testimony of Albert E. Lynes.)

ber nine. The train ran four hundred fourteen feet in thirteen seconds of time, going forty miles an hour. Here is another test where the train was running forty miles an hour; that train ran three hundred fifty-eight feet. That was a train of fifty freight-cars. That was on a grade of fifty feet to the mile downhill. That is a grade of half of one per cent. The track was straight. The cars were empty. These tests were made in October, November and December, 1887. That is made by the Westinghouse quick action automatic brake. I have never myself been called on to make any such stop as that. I have never tried to. I have never been called on to use the emergency brake. I have never been called on to stop as quickly as possible, or to make anything other than ordinary stops. I have only made ordinary stops. I was in an accident on the Northern Pacific, in which the matter came up as to how quickly I could have stopped my train, but the brakes refused to work at that time. I think I ran eight hundred feet. On that occasion I made an emergency application, but the brakes failed to work. I was then going twenty-five miles an hour, and I didn't stop until eight hundred feet, and two engines were pushing behind on the train. I was in an accident on the Great Northern. I broke up some cars at Clancy, because I didn't stop in time. I have stopped a train myself when it was going forty-five miles an hour in less distance than two hundred feet, when I was firing and going down a two per cent grade. I did this on the occasion of

(Testimony of Albert E. Lynes.)

a collision when Engineer Maze was killed. The trains stopped by the collision. The trains came together all right on that occasion but they were practically stopped before they came together. We could have stopped within three hundred feet. I have never myself seen the sight, when a train going forty-five miles an hour has been stopped within three hundred feet simply by the brakes. I don't know anything about the [75—50] tables in this Westinghouse book, other than what is stated in the book.

Redirect Examination.

I wasn't responsible for those collisions as to which I was examined. I had several collisions on the Great Northern in Butte, but I haven't been examined as regards those. I was blameless in each one, except for that one at Clancy. I took the responsibility there on my own account, and got a job afterwards on the Northern Pacific, which knew of my record about that collision.

Recross-examination.

These tests in these tables set forth on page 194 are not tests made under ideal conditions to ascertain the maximum mechanical efficiency of brakes. The tests were made with varying trains in workable condition. They took ordinary passenger trains, and didn't get the brakes into the maximum efficiency. It states that in the tests. That is found in statement in paragraph number eight, beginning with the words "Emergency at twenty miles per hour," and ending with the words, "brak-

(Testimony of Albert E. Lynes.)

ing power was used.” Table ten is the only one that shows any tests as regards passenger equipment. Table ten shows the difference between passenger and freight trains. Table ten shows a passenger train going forty-three miles an hour, and it stopped in seven hundred and sixty-seven feet. It took twenty-two seconds to make the stop. That is marked “passenger train only—compare with freight train in test number nine.” The tests I refer to in table number nine were freight trains going at forty miles an hour, but the one in column ten was a passenger train only. The train that was running forty-three miles an hour and was stopped in seven hundred sixty-seven feet was a passenger train only. In the next experiment one was a passenger train and the other a freight. The freight train stopped in three hundred nineteen feet, and the passenger train in five hundred forty-seven feet. The next was a freight and passenger train—the freight going at forty-five miles an hour and being stopped in four hundred ninety-five feet, and the passenger train in twelve hundred four feet. In the next set another [76—51] freight train was stopped in four hundred ninety-four feet, and the passenger train in eight hundred ninety feet. They can stop a passenger train quicker than they can a freight. I think the first train mentioned is the passenger train. It so states in paragraph ten. You can stop a passenger train quicker than a freight train. That is my judgment, but I can’t point out in the table here anything that shows that.

(Testimony of Albert E. Lynes.)

I can't point out in the table whether the figure 319 refers to a freight or a passenger train, or whether the figures 547 refer to a freight or passenger train. I can't tell which of the figures in table ten refer to a freight and which refer to a passenger train. I can't explain why it is that in column ten, in the five hundred forty-seven feet test, if it was a freight train, it shows that the freight train took a longer time than it did in column nine. I couldn't say whether that table ten always shows a report on a passenger train first and next on a freight train. I don't know which is referred to there. I can't say anything about that table, except what the book says.

The table referred to and all explanations thereof, referred to by the witness, read as follows: [77—52]

[Table of Automatic Brake Tests.]

Westinghouse Quick-Action Automatic Brake.

Summary of Results of Tests, With 50 Car Train, in October, November and December, 1887.

Place of Test.	Down-grades		FIRST.		SECOND.		Seconds
	Feet Per Mile.	Miles Speed.	Feet Distance.	Seconds Time.	Miles Speed.	Feet Distance.	
St. Paul	13.6	19	172	7	36	490	15
Chicago level head							
wind		22	184	10	37	480	15
St. Louis	52.8	20	176	11	36	507	18
Cincinnati	50.0	25	284	12	35	542	17
Cleveland	40.0	26	265	12	43	718	20
Buffalo	32.20	21	214	12	40	679	19
Albany	35.0	20	158	10	36	560	18
Boston	40.0	19	123	10	32	406	16
New York	53.0	23	203	12	41	674	20
Philadelphia	44.0	23	264	14	36	593	19
Washington	52.0	19	159	10	42	694	21
Pittsburgh	47.0	20	194	11	40	649	21
FOURTH.				SIXTH.			
St. Paul	{ 20		200	{ ..		...	..
	{ 37		583	{ ..		...	..
Chicago	{ 20		162	{ 11		19	1200
	{ 34		470	{ 15			62
St. Louis	35		502	17	21	2115	128
Cincinnati	37		573	17	21	1925	75
Cleveland	38		336	17	23	1686	65
Buffalo	39		648	19	20	1000	48
Albany	37		580	19	20	1342	60
Boston	34		483	17	21	1035	54
New York	41		672	20	21	2137	85
Philadelphia	36		579	18	18	1889	75
Washington	42		718	21	20	1643	67
Pittsburgh	40		673	30	20	1720	72

[78—53]

	SEVENTH.			EIGHTH.			NINTH.		
Place of	Miles	Feet Dis-		Miles	Feet Dis-	Seconds	Miles	Feet Dis-	Seconds
Test.	Speed.	tance		Speed.	tance.	Time.	Speed.	tance.	Time.
St. Paul	25	100		20	109	..	37	327	..
Chicago	20	59		20	120	6	33	272	11
St. Louis . . .	23	61		20	109	6	38	377	11
Cincinnati . .	22	32		20	102	6	41	425	12
Cleveland . . .	25	45		20	96	6	40	375	11
Buffalo		59		20	93	6	40	414	13
Albany		180		19	78	5	40	358	12
Boston	22	62		20	111	8	..	...	..
New York . . .		43		22	91	6	..	...	..
Philadelphia .	22	35		20	87	6	..	...	..
Washington .	23	58		21	81	6	40	359	11
Pittsburgh . . .		...		20	95	6	..	...	..

TENTH.			
	Miles Speed.	Feet Distance.	Seconds Time.
Cleveland	43	767	22*
Boston	38	{ 319 547 }	{ 12 17 }
New York	45	{ 495 1204 }	{ 13 27 }
Philadelphia	49	{ 647 932 }	{ 19 23 }
Pittsburgh	45	{ 494 890 }	14

*Passenger train only. Compare with freight trains in test No. 9 Third Test—In all cases the brakes went fully on within two seconds.

Fifth Test—The brakes were released in all cases in four seconds.

DESCRIPTION OF TESTS.

1. Emergency stops, train^{ing} running at *twenty miles per hour.

2. Emergency stops, train running at *forty miles per hour.

3. Applying brakes while train was standing still, to show rapidity of application.

4. Emergency stops, train running at *forty miles per hour.

5. Service stops and time of release. Exhibition of smoothness of ordinary stop and time of release.

6. Hand-brake stops at *twenty miles per hour with five brakemen at their posts. At Buffalo there were seven brakemen.

7. Breaking train in two.

8. Emergency at *twenty miles per hour, the brake leverage having been increased to give the quickest stop possible. In the seven previous tests the usual safe braking power was used.

9. Emergency stop, at *forty miles per hour same leverage as test 8.

10. A train of twenty freight cars and a train of twelve ordinary passenger coaches, run along beside each other on parallel tracks, each being about the same weight and length of trains, and the brakes applied at the same time. This shows the relative stopping power of the old and the new brake.

*Speed attempted; actual speeds attained are given in statement and as read from speed gauge on engine. Fractions of miles and seconds are omitted. Two engines were used in making tests at St. Paul, and one in other tests. [80—55]

(Testimony of Albert E. Lynes.)

The table on page 194 will be of interest, as it shows how quickly air-brake trains can be stopped when fitted with the Westinghouse quick-action brake.

The train consisted of fifty Pennsylvania 60,000 capacity box-cars whose light weight was 30,000 pounds each. [81—56]

Thereupon the defendant moved the Court to strike out the testimony of the witness as regards the tables in question, upon the ground that his examination had shown that he could not explain the tables.

Which motion was by the Court overruled. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

Redirect Examination.

You can stop a passenger train much quicker than you can a freight. These tests were made in 1887. The efficiency since then has been increased a great deal.

Plaintiff rests.

Sur-rebuttal.

[Testimony of A. B. Ford, for Defendant (in Sur-rebuttal).]

A. B. FORD, being first duly sworn as a witness in behalf of the defendant, in sur-rebuttal, testified as follows:

Direct Examination.

The tables used by the witness Lynes are Westing-

(Testimony of A. B. Ford.)

house tables referring to freight trains, light weight thirty thousand pound cars. There were fifty cars. There were no passenger trains in the ninth column, which is the test to which Mr. Lynes referred in drawing his conclusions as to the distance within which passenger trains could be stopped. In this table the only single passenger train test referred to is one running forty-three miles an hour, which was stopped in seven hundred sixty-seven feet.

I produce here the book, which gives the test made for power by the Westinghouse brake, made by the same company. This is a standard text-book. The test referred to was made on October 1st and 2nd, 1894, near Scranton, Pennsylvania, descending a grade nearly twenty-nine feet to the mile—the weather being fair and the rails dry. The train was [82—57] made up of a locomotive and fifty freight-cars of a total capacity of five hundred and sixty-four thousand pounds. The test taken was with brake equipment of an ordinary kind—ordinary quick action automatic brakes. This book which I have, setting forth this test, is a standard text-book. It says in paragraph 35, section four, page 29, as follows:

35. The tests referred to were made on October 1 and 2, 1894, near Ship Road, Pennsylvania, on a descending grade of 29 feet to the mile, the weather being fair and the rails dry. The train was made up of a locomotive and six Pennsylvania Railroad passenger cars, the total weight of the train being 564,-

000 pounds. The train was fitted throughout with the high-speed brake equipment before the test began, and no alterations were made during the test. The brakes were converted from ordinary quick action at 70 pounds to high speed at a much higher pressure, and back again, by simply cutting in the proper pump governor and feed-valve, so that the same apparatus was used in all the tests. A correct speed recorder was used for measuring and recording the speed of the train, and the brakes were applied at a certain spot by means of a trip arrangement (connected to the train pipe) coming in contact with an obstruction that was fastened to one of the ties. This fixed the exact spot at which the brakes were applied, and enabled the length of the stop to be accurately measured.

The tests on the first day were made at a speed as near 45 miles per hour as possible, two tests being made with the ordinary quick-action automatic brake, and three with the high-speed brake cut in. The train-pipe pressure in the first two tests was 71 and 69 pounds, respectively, while in the last three tests it was 100, 104, and 100 pounds respectively.

[Table of Automatic Brake Tests.]

RESULTS OF BRAKE TESTS.

First Day.				
Train-pipe Pressure Pounds.	Actual Speed in Miles Per Hour.	Length of Stop in Feet.	Corresponding Length of Stop at 45 Miles Per Hour.	Average Length of Stop at 45 Miles Per Hour.
71	47¾	776	694)	
69	45½	697	683)	688
100	46¾	584	567)	
104	46¼	610	580)	567
100	47	601	555)	

Second Day.				
Train-pipe Pressure Pounds.	Actual Speed in Miles Per Hour.	Length of Stop in Feet.	Corresponding Length of Stop at 60 Miles Per Hour.	Average Length of Stop at 60 Miles Per Hour.
68	60¾	1697	1,658)	
71	61½	1634	1,558)	1,622
71	58¾	1584	1,649)	
100	61¼	1372	1,319)	
104	61½	1361	1,299)	1,296
105	61½	1330	1,269)	
108	58¾	1125	1,189)	
109	64¼	1202	1,155)	1,172

[83—58]

On the second day, the tests were made at a speed as near 60 miles per hour as possible, three tests being made with a train-pipe pressure of about 70 pounds, and five with pressure of about 100 pounds. The observations taken during the tests are given in the preceding table.

EXPLANATION OF TABLE.—Column 1 gives the train-pipe pressure used in each test; column 2 gives the actual speed of the train at the time the emergency application took place; column 3, the actual distance in feet the train traveled after the emergency application was made; column 4, the distance in feet the train would have traveled had it been running at the speed indicated (45 the first day, 60 the second), instead of at the actual speed as

(Testimony of A. B. Ford.)

given in column 2; column 5 gives the averages of the distances marked with brackets in column 4.

From column 5 it will be seen that, at a speed of 45 miles per hour, the high-speed brakes will stop a train in about 120 feet less space than the ordinary quick-action brake, while, at 60 miles per hour, it will stop the train in about 450 or 326 feet less distance, depending on whether the train-line pressure used is greater or less than 105 pounds.

The tables show that with a train-pipe pressure of seventy-one pounds, and actual speed in miles per hour of forty-seven and three-quarters miles, the length of stop was seven hundred seventy-six feet. At forty-five miles per hour, the length of stop was six hundred ninety-four feet. In a second test with sixty-nine pounds train pressure, running at forty-five and a half miles per hour, the length of stop was six hundred ninety-seven feet. At forty-five miles an hour, the length of stop was six hundred eighty-three feet, making an average of six hundred eighty-eight feet. These tests were made with an ordinary quick-action automatic brake, of the Westinghouse Company, similar to the New York brake. I have never made any of these tests myself, but I have had instructions as to how to make them. When these tests are made you put everything up to the standard. You renew all brake-shoes. The object of the test is to see what it is possible to do. As to comparing the distance within which passenger trains or freight trains could be stopped, and comparing a loaded passenger train of four cars, with a freight train of fifty light cars, that would depend on the

(Testimony of A. B. Ford.)

grade. If it was practically a level grade, fifty cars would stop much quicker, for the reason that each car has independent braking power, and there is no great resistance to overcome. The fifty cars would stop quicker if they were light weight [84—59] cars. Coaches weigh from fifty thousand pounds up. Our sleepers each weigh about forty-five—close to fifty thousand pounds.

Cross-examination.

Down grade there is momentum to overcome. The stop which I say in this table was made in seven hundred seventy-six feet was about a six-tenths grade. In that test there were fifty sixty-thousand capacity freight-cars, the light weight of the cars being thirty thousand pounds. The weight of the train on a downgrade, to a certain extent, has something to do with the stopping power. A chair car would weigh about forty-five thousand pounds. The day coach would probably go better than thirty thousand pounds. A smoking-car would be about the same; perhaps they would weigh thirty-seven thousand pounds apiece. The entire weight of the train would be one hundred fifty thousand pounds. In the test to which I referred there were fifty freight-cars; those were fifty light box-cars, thirty thousand pounds each. The freight-train was ten times as heavy as the passenger train, yes, sir.

Defendant rests.

The foregoing is all the testimony introduced in the trial in the above-entitled cause. [85—60]

Thereupon at the close of all the evidence in the case the defendant moved for judgment as follows:

[Motion for Judgment of Nonsuit, etc.]

Comes now the defendant, Great Northern Railway Company, at the close of all the evidence in the case and moves the Court for a judgment of nonsuit and dismissal on the merits upon the grounds following:

1st. The evidence does not disclose facts sufficient to establish a cause of action in favor of the plaintiff and against the defendant.

2d. The evidence does not disclose the violation of any legal duty owing by the defendant to the plaintiff.

3d. The evidence discloses that the plaintiff was guilty of contributory negligence, proximately causing his injury.

4th. The uncontradicted evidence discloses that the plaintiff was a trespasser upon the defendant's track, and that the engineer did everything in his power, at the time he discovered the plaintiff upon the said track, to avoid injuring him.

5th. The uncontradicted evidence shows that the plaintiff and the defendant were both present, each in possession of their faculties, and that the plaintiff was guilty of contributory negligence; in the first place, in coming on the track; and in the second place, in unnecessarily remaining on the track, and in leaving the track upon the side, or in the direction, in which the car would be thrown, rather than the side where it would not be thrown.

6th. The uncontradicted evidence shows that the plaintiff was not only a trespasser, but was engaged

in acts involving moral turpitude, and stated by him to be dangerous to persons properly using the track, and to be dangerous to trains passing on the same; and hence the law does not throw about him, nor impose upon the defendant, any duty to exercise reasonable care to avoid injuring him, while so engaged, or engaged in avoiding the consequences to others of his said unlawful acts, so involving moral turpitude. [86—61]

Which said motion was by the Court overruled. To which ruling of the Court defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Instructions Requested by Defendant.

Thereupon the defendant requested the Court to give the said defendant's requested instructions as follows, to wit:

No. 1. You are instructed to return a verdict for defendant.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 2. You are instructed that under the evidence, the engineer did all in his power, or at least exercised reasonable care in the matter of checking the speed of the train, and you cannot find him negligent in this regard.

Which said instruction the Court refused to give.

To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 3. You are instructed that the evidence conclusively establishes that defendant's engineer, under its air-brake system, could not get an emergency application of the brake after making the service application without releasing and recharging.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows: [87—62]

No. 4. You are instructed that under the evidence, it was not the duty of the engineer to reverse his engine.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly **noted and allowed.**

Defendant likewise requested that the Court give its requested instruction as follows:

No. 5. The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the de-

fendant were negligent, and that the negligence of each contributed up to cause the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury, then he cannot recover.

Which said instruction the Court refused to give as tendered but modified the same as set forth in the court's charge. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 6. Where both plaintiff and defendant are present, and plaintiff is in possession of his mental faculties and is or continues to be negligent, then such negligence continues as a proximate cause of his injury as long as he continues to be present and in possession of his faculties and he cannot recover.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its [88—63] counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the court give its requested instruction as follows:

No. 7. If you find that plaintiff was guilty of any negligence, and that such negligence or any carelessness, or other act on his part threatened injury to

persons on the train as it approached, and plaintiff remained on the track to avoid the consequences to others of his said negligence and carelessness, then you are instructed that under such circumstances his said negligence and carelessness continues as a cause of the accident, even though he acted reasonably in trying to avoid the consequences thereof, and he cannot recover.

Which said instruction the court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 8. If you find that plaintiff's act in using the push-car, referred to in the evidence, was an act likely to result in the derailment of an engine or train approaching the same, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and it would be his duty, as soon as he learned of the approach of a train to exercise reasonable care to attempt to get the car off the track or in a situation where it could not imperil the train and thus to avoid the threatened consequences, if any, of his said act. Such action on plaintiff's part would thus constitute action done by him in discharging a duty resting upon him to others and arising by reason of his alleged wrongful conduct, and for any injury sustained by him while thus engaged in removing or undoing the said effects of his said unlawful conduct, if any, defend-

ant would not be liable under the evidence in this case. [89—64]

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 9. If you find from the evidence that plaintiff's act in using the push-car referred to in the evidence was an act likely to result in the derailment of the engine or train, or of any engine or train proceeding on the track, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and the railway company would owe him no duty of care and would owe to him no duty other than not wilfully and intentionally to injure him, and your verdict must be for the defendant.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No 10. The law does not impose a duty upon defendant to exercise care not to injure unintentionally a person who is trespassing on its railroad track without right, and engaged thereon in an undertaking which may result in damage to defendant if

such undertaking was not only unlawful, but constituted at least a moral wrong which might result in serious consequences. Thus a contractor engaged in erecting a building is not liable for carelessness on the part of his employees resulting in injury to a person who has gone on the premises with the intention of blowing up the building, or with the intention of removing explosives therefrom which he had previously placed there for the purpose of blowing up the building, for the law will not create a duty of care for the protection of one [90—65] so engaged in doing a criminal or unlawful act or in trying to undo the consequences thereof.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 11. If you find that plaintiff remained on the track and endeavored to remove the hand-car from the track in order to prevent the derailment of the approaching train, and that his conduct in this respect under all the circumstances was reasonable, nevertheless, he cannot recover if the hand-car being on the track was the consequence of his own wrong, if any. In other words, a person engaged in protecting life, limb or property cannot recover merely because at the very time he was in peril, he was acting under the perils then existing, and to avert which he was engaged, when the necessity for his

so doing is caused by his own negligence; that is to say, a person cannot escape the consequences of his own anterior negligence merely because at the time he was injured, he was engaged in trying to avoid the consequences to others of such negligence, and in so doing, was acting reasonably, or without negligence; in such case, his anterior negligence would continue as a cause and would bar a recovery.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 12. You are instructed that if a person has two or more ways of accomplishing any purpose, one of which is dangerous, and [91—66] the other of which is safe or less dangerous, and he unnecessarily and negligently selects the dangerous or more dangerous way, and his injury is caused in part by the choice of ways so made by him, then he is guilty of contributory negligence, and cannot recover.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed. [92—67]

THEREUPON the case was argued to the jury by counsel for the respective parties, and at the close of the argument the Court gave to the jury its charge as follows:

Instructions.**GENTLEMEN OF THE JURY:**

The plaintiff in this action was seriously injured, it is very apparent, on the right of way of the defendant; and, to recover for those injuries, he brings this action. He founds his action upon the theory that he had a right to be where he was, at the time he was, and under the circumstances; but the Court is compelled to say that he could not recover on that theory, and is not entitled to the benefit of the rules of law that would apply to that situation, had it been proven; but that, on the contrary, as the evidence discloses, he was there at that time and place as a trespasser upon the track of the railway company, which brings into play other rules of law under which he may or may not be entitled to recover, depending upon how you view the evidence under the law, or the rules of law that the Court will declare to you.

It seems that he was working for railroad contractors at the tunnel of the defendant, and that the cause of action is founded upon the proposition that, of course, he had a right to a way out of there whenever he quit work, and that this way over the railroad track up to Basin was the only practical way—virtually the only way. But it seems from the evidence that there was a county road along there, which the plaintiff says he would not take, because he would have to wade across a creek, or that he assumed that he would, because he saw one place where the road crossed the water, and that he saw

the road from different places along there, at least saw the road from the track. I don't think he says he saw it from the tunnel. He says that supplies had been taken from Basin to the tunnel. But that would not justify the plaintiff in believing that he had a right to go on there with his push-car, to take his baggage after he quit work. He also said [93—68] he did not expect a train; although he was told that there was liable to be a train, and he left the tunnel about the time this particular train was due to come from Basin to the tunnel. He says he saw no evidences of a train as he left the tunnel. Under the circumstances, he had no right to go there, and was, therefore, what is termed in law a trespasser.

Under such circumstances the law with reference to trespassers is this: That the railroad company is not obliged to foresee that trespassers will be on its track. Its public business is the transportation of the mails and passengers and freight, and it has the right to use its track for that purpose. So that trespassers up to a certain point must look out for themselves.

A railroad company owes no active duty to keep a lookout for trespassers upon its tracks. Such trespassers go upon its tracks at their own peril as against their presence not being discovered. A railroad company owes no duty of care to a trespasser other than not wilfully or wantonly to injure him or not negligently to bring force to bear against him after not only his presence but his peril is discovered.

You are instructed that at least until plaintiff's presence was discovered, defendant was entitled to

run its train at any high rate of speed it saw fit, and plaintiff cannot complain of the speed of the train prior to the time when he was first seen.

You are instructed that, under the uncontradicted evidence in the case, the plaintiff saw the engine approaching just as it came in sight around the curve, and no negligence can be charged against the defendant company in the matter of whistling, or not whistling, as the case may be. In considering, therefore, whether or not the defendant was negligent, you will disregard any alleged failure to whistle, and you can find a verdict against the defendant only if you find from the evidence that it was negligent in some other particular than in the alleged failure to whistle. [94—69]

A railroad train, on a railroad track, has its signal as a warning to the trespasser, or to anyone who stands in its way; and the whistle, of course, is intended for no other purpose, but he who is conscious of the fact that a railroad train is ahead of him, and coming on the track towards him, has, in that, a signal as good as any whistle would furnish him.

As regards giving warnings of the approach of trains, you are instructed that even where such a duty exists (and there was no duty to signal any trespassers, until at least they were in sight), that duty is dispensed with when the person injured in any manner acquires the information which would be given by the bell or whistle. If, therefore, you find that at any time the plaintiff saw the train approaching, it would be unnecessary after that for defendant to give warning of the approach of the train

and to advise plaintiff, by whistle or otherwise, of what he had himself ascertained. In other words, a plaintiff's knowledge, however acquired, dispenses with the necessity of any one giving him the same knowledge by bell or whistle or otherwise.

The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent and that the negligence of each contributed upon to and caused the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury at the time of the injury, then he cannot recover.

The rule of law as stated by the Court is: That the railroad need not be watchful for trespassers; but when a trespasser is discovered, when his peril is discovered, then the railroad company—which [95—70] means the engineer under these circumstances must exercise reasonable care to avoid injuring him. Now, observe that not always is it necessary for the engineer to commence taking precautions, the moment he sees a trespasser. That is not required. The engineer generally has a right to assume that a trespasser on the track is in possession of his natural faculties and that the instinct of self-preservation will warn him to remove himself from the track in time to avoid collision with the

train. To illustrate: If the engineer sees a man walking on a track several hundred feet ahead of him, he does not need to warn him to take precautions, because he has a right to assume that the man will get out of the way. That happens hundreds and thousands of times every day; and no trespasser has any right to go on there to the detriment of others; but if he would see a man five hundred or a thousand feet away caught in the middle of a long trestle, it would be apparent at once, and it would be obvious to the engineer, that that man was in peril and he should look out to see that he would not run over him, and take great precaution to avoid injuring him.

So, in this case, if the engineer coming around the curve saw the man busy with a hand-car five hundred feet away, whenever he conceived, in his honest judgment, that this trespasser was not going to get out of the way, if in his judgment, it was a case where this plaintiff intended to stay there and struggle with this baggage and the hand-car, at the peril of his own life, until possibly the train had run into him, it would be the duty of the engineer to begin to take precautions as soon as it was apparent to him. In other words, the engineer, generally, is not required, himself, to take the precaution the moment he sees a trespasser, but only at the moment that it begins to be obvious to the engineer that the trespasser is not, himself, going to get out of the way and is going to be run over. But when it becomes obvious that there is something wrong, and that this trespasser on the track likely will not get out of the way, humanitarian reasons then make it

the duty of the engineer to take every [96—71] reasonable precaution to vigorously and actively save, if he can, the trespasser from being injured by the train. Of course, it must be borne in mind that the engineer's first duty on a passenger train is to the train and the passengers upon it. He must remember them and at the same time he must look out, as far as it is reasonable, to protect a trespasser. He is not obliged to bring a great deal of harm and to sacrifice passengers to save a trespasser; but he is obliged to take every reasonable precaution, under all the circumstances—all active precautionary measures that he can to protect the trespasser, after it is obvious to the engineer that his peril is imminent. He can wait until the last minute before he needs to take any precaution; and the Court means by the last minute that he can wait until it is obvious to his honest judgment that if he does not take precautions, the trespasser is likely to be hurt, and then is the time he must commence active measures for the trespasser's protection.

Another thing: The engineer's honest judgment is what determines whether or not he was negligent or not negligent. Mind you, the company's liability depends on whether or not the engineer was negligent or was not negligent. If the engineer was not negligent, although the accident happens and the trespasser is injured or killed, the company is not liable. If the engineer was negligent under the circumstances, then the company would be liable. But the engineer is entitled to exercise his honest judgment; and if he has done that and done all that his honest

judgment tells him, under the circumstances, he ought to do, then, though the trespasser is injured or killed, the company would not be liable, because, the trespasser has put himself in a position where the engineer must exercise judgment, and he must take the consequences of a mistake of judgment, if the engineer exercises it honestly and yet the trespasser is injured. For instance in this particular case, the evidence tends to show,—and there is some conflict that you are to determine—the evidence tends to show that the [97—72] moment the engineer came around the curve and saw this trespasser, he put on all the air he had, gave the service application, or a full service application. He tells you the reason why he did not put in the emergency, that it was not practicable under the conditions as they then existed, without first taking off all his air, which, of course, would increase the speed of the train, going downgrade, allowing the reservoirs or some of them and the train line, to be recharged and then reapply the air, and he told you the effect of the emergency brakes upon the passengers. Now, if the engineer, at that time and place, did what seemed to him honestly sufficient to save the trespasser, or did it after it became apparent to him that the trespasser required saving, and was not saving himself; if he did what in his honest judgment was sufficient, the defendant would not be liable. You must remember, in weighing the testimony and considering the situation, that, as we look back at a situation of that sort, we can always say that if he had done this other thing the man would have been

saved. But you must put yourself in the position of the engineer, or of a reasonable, prudent man at that time and place, and determine what he would do in the emergency presented to him and in the time that was given him to do it, to determine whether he exercised an honest judgment and did what, in his judgment, was honestly sufficient at the time; and take into consideration also the speed at which the train was coming around the curve. You will remember that event, that it was five hundred and ten feet that the engineer assumes, in nine seconds—less than nine seconds—at the speed he was going, he would be down on to the hand-car, if it was not taken out of the way. You will consider whether or not the engineer had the right to judge, or had the right to conclude, that the plaintiff was getting out of the way in time and getting his hand-car out of the way in time. A party in the position that this plaintiff was, in bringing himself there, was guilty of contributory negligence; but, up to that time, you can put that out of sight, because, while he put himself there by his negligence, [98—73] he was entitled to the rules of law governing the protection of trespassers, insofar as the law is applicable here.

If Harman remained with the hand-car in his attempt to remove the same from the track in a reasonable effort to avoid a probable disaster, if the car made disaster probable, to the approaching train and persons riding thereon; then it is relevant for you to consider this proposition of law; the law has so high a regard for human life that it will not impute negligence to an effort to preserve, unless made

under such circumstances as to constitute rashness and recklessness in the judgment of prudent persons.

But if you should consider that the engineer did not exercise an honest judgment and do all that was reasonably within his power to do, under the circumstances there disclosed, then you must consider whether this plaintiff was guilty of such rashness and recklessness in remaining upon the track in an honest endeavor to either remove his baggage or hand-car, or both, as to make himself guilty of negligence at the very moment he was struck by the engine and the hand-car; that is to say, if the plaintiff was guilty of conduct at that particular moment when he was struck, or immediately preceding it, that a prudent, reasonable man would not have done, under the circumstances, then no matter what the engineer's judgment was, or the engineer's failure was, if his negligence contributed to his own injury at that moment, why then, again, the plaintiff would not be entitled to recover.

But you have a right to consider, in weighing the plaintiff's conduct, this instruction that I have just given you, and that he says to you that he feared the wreckage of the passenger train, and hence he stayed with the hand-car in his efforts to remove it. Now, if that is what a prudent and a reasonable man, animated also by desire to save life would do, then the plaintiff would not be guilty of any neglect at that moment, depriving him of a right to recover, if the engineer of the defendant was guilty of negligence in seeking to reserve and protect him, and it caused the injury. 99—74]

With respect to the question of negligence, the definition of negligence is as follows:

Negligence is the failure to exercise such care as the law requires should be exercised by one person for the benefit of another who has been injured by the former.

As regards negligence, before you can find defendant negligent towards plaintiff, you must first find whether under the Court's instructions the defendant owed any duty of care to plaintiff: (the Court has told you he did owe a duty to him after he was discovered in peril) and, if so, how much care the defendant owed. In this connection, it is not sufficient for a plaintiff to show that a defendant owed a duty of care to others than the plaintiff, and that if that duty had been discharged, the plaintiff would not have been injured.

This part of the instruction was perhaps framed in view of some abandoned proposition that has not arisen in the case.

The standard of care, where any care is required, is merely ordinary care, that is, such care and caution as the average reasonably prudent person, under all the circumstances, would ordinarily exercise. The test as to whether defendant was negligent is not whether defendant could have prevented the accident. The test is not even whether defendant exercised such care as the average reasonable prudent person should or even would exercise, but whether defendant exercised such care and caution as the average reasonably prudent person under all the circumstances would ordinarily exercise.

I have used in this charge several times the expression "ordinary care." The law required in such cases as this only ordinary care, but I charge you that ordinary care is measured by, must be equal to and varies with the danger of the general surrounding circumstances. As the danger of the force or instrument a man is using increases, so does the degree of care, which the law requires of the man using the force or instrument increase; to illustrate, the same conduct in a man handling a wagon with horses might be ordinary care but might be negligence in a [100—75] man driving an automobile or steam engine.

The plaintiff must prove his original cause set out in his complaint by a preponderance of the evidence (that is to say that he was injured through some act of negligence of defendant's servants, as alleged by him or as proven by all of the evidence, if it is proven, whether it be the evidence of plaintiff or defendant by any of the witnesses against themselves. The preponderance of the evidence is not determined by which side has the most witnesses testifying to any fact in dispute; you are at liberty, if it commends itself to you, to believe a less number or a single witness against a greater number, if from all of the testimony and circumstances shown by the testimony you are convinced that the less number or a single witness is entitled to greater credibility.

I will say to you, Gentlemen of the Jury, that you have heard all the evidence, and the Court does not propose to review it. It has been argued now by

counsel, and the testimony itself is very brief. There is some conflict in it; but you are to determine those conflicts.

In addition to the expressed facts that have been proven before you, by the direct statements of the witnesses, there are various inferences which can be drawn from the testimony, as reasonable men, and it is for you to draw them. Of course, there are some aspects of the evidence, if you follow it, from which you would infer one character of inferences; and if you follow the other aspect of the evidence it would justify a different inference, and it is for you to draw them.

(The remaining portion of the Court's instructions to the jury related only to the measure of damages and is omitted.)

[Objections and Exceptions to Instructions.]

Thereupon the defendant duly objected and excepted to the Court's said instructions as follows:

The defendant duly objected and excepted to all that part of the [101—76] instructions of the court imposing any duty of care on the part of the railway company, however slight, on the ground that at the time the plaintiff was injured he was guilty of an act involving moral turpitude and therefore no duty of care of any kind would, under the law, be accorded to him. Where the person is injured in an act involving moral turpitude the law will not throw about him a duty upon others to exercise care for his protection, especially when that act so involving moral turpitude involves risks to others or to the persons who might otherwise be required to

exercise care for his protection, and the same is true where a person is engaged in merely endeavoring to remove the consequence of acts of his involving moral turpitude.

Which said objections were overruled and defendant's exception thereto and defendant's exception to the giving of said portion of said instructions for the reasons stated were duly noted and allowed.

Defendant also duly objected and excepted to all that part of the charge of the Court on the matter of contributory negligence operating as a cause at the time of the injury upon the ground that in this instance both parties were present and in full possession of their faculties and therefore any negligence in the operation of the car, or whereby the plaintiff got upon the right of way, would continue as a cause of the accident, up to the moment of the accident.

Which said objection was by the Court overruled. To which ruling of the Court and to the giving of said portion of said instructions to the jury the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Said objections and exceptions to the instructions of the Court were duly made and taken, noted and allowed immediately after said instructions were given by the Court and before the Jury had retired to consider of its verdict.

Thereupon the Jury retired to consider of its verdict and thereafter returned into court with the request that the Court give further instructions on the issue of contributory negligence. [102—77]

[Further Instructions.]

Thereupon the Court instructed the Jury as follows:

If the peril of the plaintiff, when the defendant's engineer first saw him upon the track, was obvious to the average reasonable man; that is to say, if it was apparent then and there to the average reasonable man that the plaintiff's situation was such that he was likely to remain struggling with the hand-car and his baggage, until the last moment in an effort to remove them from the track, and the likelihood of being injured by the oncoming locomotive, reasonable care on the part of the engineer would demand that he immediately begin active and vigorous efforts to stop and to protect and avoid injuring the plaintiff. If this was the situation and the engineer failed therein, it would be, under the circumstances, negligence and for which, if the plaintiff's injury was entirely due thereto, the defendant would be liable to the plaintiff. In determining whether this was the situation you must bear in mind that there is evidence tending to show that as soon as the engineer saw the plaintiff on the track, he did begin efforts to bring the train to a stop to avoid a collision with the plaintiff. It is for you to say, under all the circumstances, whether this is true, whether these measures taken by the engineer were such, as, in his honest judgment would serve to protect the plaintiff. If so, then, for a mere mistake in his judgment, honestly exercised, no negligence could be imputed to him, and hence the defendant

would not be liable to the plaintiff for any injury that followed.

Further, the evidence also is, that as soon as the engine came in sight on the curve, the plaintiff observed it and that he began his efforts to remove the load from the car, and the car from the track. It is for you to determine whether therein he acted as a reasonably prudent man would act under the circumstances; whether there was, in the judgment of a reasonably prudent man such danger, or source of danger, to the oncoming train and its passenger that a humane purpose to save them therefrom would justify the average reasonable man in remaining upon the track, taking the hazard of injury to himself, in order to remove the [103—78] handcar and its baggage, to avoid the likelihood of damage to the oncoming passenger train and its passengers.

If you find that the plaintiff was not thus justified, but that on the contrary his conduct was imprudent to the extent of being rash and reckless, then the plaintiff would be guilty of contributory negligence proximately causing his injury, and it would deprive him of any right to recover, even though the defendant's engineer is found by you to also have been negligent.

Insofar as the plaintiff's final act in running around the push-car so that he was in a position to be struck by it, when the push-car was struck by the engine, this of itself does not necessarily show negligence. If the plaintiff was justified in his efforts to clear the track, to the extent that he would forget the instinct of self-preservation in obedience to a

humane impulse to protect the oncoming train and its passengers; and if, thereby, he remained upon the track until the last moment and then sought to escape, you must remember that he had very little time, if any, to think of the course he should take to protect himself, whether he should run, where he should place himself. That if still acting reasonably, he took the more dangerous way, that alone would not be contributory negligence, and would not deprive him of a right to recover, if otherwise entitled thereto, as I have instructed you.

[Objections and Exceptions to Further Instructions.]

To the giving of all that part of said further instructions to the effect that test for the jury in determining the issue of contributory negligence is as to whether or not the plaintiff was reckless or rash.

The defendant by its counsel then and there duly objected and excepted upon the grounds that the law precludes a recovery by the plaintiff not only if he was reckless or rash but even though if not reckless or rash he failed merely to exercise reasonable care for his own safety.

Which said objection was by the Court overruled. To which ruling of the Court defendant by its counsel then and there duly excepted, [104—79] which said exceptions were then and there duly noted and allowed.

Defendant also duly objected and excepted to all that part of said further instructions relating to contributory negligence on the grounds stated in the

general instructions to the general charge of the Court heretofore given and on the ground that any negligence of the plaintiff in this case continues as a cause of the accident up to the time of the accident since both parties were present and in possession of their faculties.

Which said objection was by the Court overruled. To which ruling of the Court defendant by its counsel then and there duly excepted and said exceptions were thereupon duly noted and allowed.

Said objections and exceptions were made and taken, noted and allowed before the Jury again retired to consider of their verdict.

Thereupon, the Jury returned again to consider of their verdict and thereafter returned into court with a verdict in favor of the plaintiff and against the defendant assessing the plaintiff's damages in the sum of Fifteen Hundred Dollars.

Thereafter by stipulations of the parties and by an order of the above-entitled court, duly given and made, the time within which defendant might prepare and serve its bill of exceptions was extended to and including September 1st, 1913. [105—80]

And now, therefore, in furtherance of justice and that right may be done, the defendant presents the foregoing as and for its Bill of Exceptions to the rulings made and proceedings had on the trial of the above-entitled cause and prays that the same may be settled and allowed and signed and certified by the

Judge of the above-entitled court, who tried said cause, as provided by law.

H. C. HOPKINS,
VEAZEY & VEAZEY,
Attorneys for Defendant.

Admission of Service of Bill of Exceptions.

Due personal service of the foregoing Bill of Exceptions made and admitted, and receipt of copy acknowledged, this 25th day of August, A. D. 1913.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Plaintiff.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated that the foregoing Bill of Exceptions is true and correct and that the same may be settled and allowed, and signed and certified, as defendant's Bill of Exceptions to the rulings made and proceedings had on the trial of the above-entitled cause.

Dated this 25th day of August, A. D. 1913.

MAURY, TEMPLEMAN and DAVIES,
Attorneys for Plaintiff. [106—81

*In the District Court of the United States in and
for the District of Montana.*

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Order Settling and Allowing Bill of Exceptions.

This cause coming on regularly before the Court on this 25th day of Sept. A. D. 1913, being a day of the April term, A. D. 1913, of said District Court, and being a day of the same term as that in which the judgment herein was rendered and entered, upon the application of the defendant for the settling and allowance of its proposed Bill of Exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of the Court, and the plaintiff, by his attorneys, having waived its right to proposed amendments thereto and having consented that the same may be now settled and allowed as presented.

IT IS NOW ORDERED that the foregoing Bill of Exceptions be and it is hereby settled and allowed as a true Bill of Exceptions in this cause as prayed, and the same is now certified accordingly by the undersigned, the presiding Judge of said court, who tried said cause, and it is ordered that the same be filed *nunc pro tunc* as of July 15th, A. D. 1913, and made a part of the record herein.

Done in open court this 25th day of Sept. A. D. 1913, and ordered entered as above.

GEO. M. BOURQUIN,

United States District Judge for the District of Montana.

Filed Sept. 25, 1913. Geo. W. Sproule, Clerk.
[107]

And thereafter, on January 13, 1914, Assignment of Errors was duly filed herein, being as follows, to wit: [108]

In the District Court of the United States in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Assignment of Errors.

Comes now Great Northern Railway Company, the defendant in the above-entitled cause and, pursuant to its petition for a writ of error, filed herein, makes and files this its assignment of errors setting forth why the judgment herein should be reviewed on writ of error and reversed, and says that the Court was in error in the particulars following and that it the said defendant herein, plaintiff in error in the Circuit Court of Appeals, will rely upon the following errors in the prosecution of said writ, to wit.

I.

It was error in the Court to overrule the defendant's objection to the following question, as follows:

“Q. What is the general custom among railroad engineers and people operating trains in the United States, as to making signals at obscure places.

Mr. VEAZEY.—We object to that as wholly

immaterial; customs elsewhere cannot be binding on the defendant railroad company, and it hasn't been shown that there was any duty owing by the [109] defendant railroad company to the plaintiff, and the conditions where the alleged customs are supposed to have existed are not shown to have been similar to the conditions existing here."

Which said objection was by the Court overruled.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

II.

It was error in the Court to overrule defendant's objection to the following question, as follows:

"Q. Why did you not leave the hand-car on the track?

Mr. VEAZEY.—That might have a bearing solely on the issue of contributory negligence, but as regards any feature of the case that this man was trying to save his property, or to protect the train, which he had thus imperiled by his own act, we object to that question upon the ground that it seeks to elicit testimony not within the issues, with regard to negligence of the defendant, raised in the pleadings in this case."

Which objection was by the Court overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

III.

It was error in the Court to overrule defendant's motion for a judgment of nonsuit and dismissal upon the merits at the close of plaintiff's case.

IV.

It was error in the Court to overrule defendant's motion for a judgment of nonsuit and dismissal on the merits, at the close of all the evidence. [110]

V.

The verdict is against law, in that the Court charged the jury that there could be no recovery by the plaintiff unless it was established by the evidence that the engineer failed to exercise an honest judgment, and that for an honest mistake in judgment on his part, there could be no recovery but the uncontradicted proof shows that the engineer did exercise an honest judgment, and that he made no mistake in his judgment, but that if any mistake was made it was an honest mistake.

VI.

It was error in the Court to refuse defendant's requested instruction No. 1, as follows:

"No. 1. You are instructed to return a verdict for defendant."

VII.

It was error in the Court to refuse defendant's requested instruction No. 2, as follows:

"No. 2. You are instructed that under the evidence, the engineer did all in his power, or at least exercised reasonable care in the matter of checking the speed of the train, and you cannot find him negligent in this regard."

VIII.

It was error in the Court to refuse defendant's requested instruction No. 3, as follows:

"No. 3. You are instructed that the evidence conclusively establishes that defendant's engineer, under its air-brake system, could not get an emergency application of the brake after making the service application without releasing and recharging." [111]

IX.

It was error in the court to refuse defendant's requested instruction No. 4, as follows:

"No. 4. You are instructed that under the evidence, it was not the duty of the engineer to reverse his engine."

X.

It was error in the court to refuse defendant's requested instruction No. 5, as follows:

"No. 5. The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent, and that the negligence of each contributed to cause the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury, then he cannot recover."

XI.

It was error in the court to refuse defendant's requested instruction No. 6, as follows:

"No. 6. Where both plaintiff and defendant are present, and plaintiff is in possession of his mental faculties and is or continues to be negligent, then such negligence continues as a proximate cause of his injury as long as he continues to be present and in possession of his faculties and he cannot recover."

XII.

It was error in the court to refuse defendant's requested instruction No. 7, as follows:

"No. 7. If you find that plaintiff was guilty of any [112] negligence, and that such negligence or any carelessness or other act on his part threatened injury to persons on the train as it approached, the plaintiff remained on the track to avoid the consequences to others of his said negligence and carelessness, then you are instructed that under such circumstances his said negligence and carelessness continues as a cause of the accident, even though he acted reasonably in trying to avoid the consequences thereof, and he cannot recover."

XIII.

It was error in the court to refuse defendant's requested instruction No. 8, as follows:

"No. 8. If you find that plaintiff's act in using the push-car, referred to in the evidence, was an act likely to result in the derailment of an engine or train approaching the same, then the act of the

plaintiff in using the same was under the evidence a wrong involving moral turpitude and it would be his duty, as soon as he learned of the approach of a train to exercise reasonable care to attempt to get the car off the track or in a situation where it could not imperil the train and thus to avoid the threatened consequences, if any, of his said act. Such action on plaintiff's part would thus constitute action done by him in discharging a duty resting upon him to others and arising by reason of his alleged wrongful conduct, and for any injury sustained by him while thus engaged in removing or undoing the said effects of his said unlawful conduct, if any, defendant would not be liable under the evidence in this case."

XIV.

It was error in the court to refuse defendant's requested instruction No. 9, as follows:

"No. 9. If you find from the evidence that plaintiff's act in using the push-car referred to in the evidence was an act likely to result in the derailment of the engine or train, or of [113] any engine or train proceeding on the track, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and the railway company would owe him no duty of care and would owe to him no duty other than not wilfully and intentionally to injure him, and your verdict must be for the defendant."

XV.

It was error in the court to refuse defendant's requested instruction No. 10, as follows:

“No. 10. The law does not impose a duty upon defendant to exercise care not to injure unintentionally a person who is trespassing on its railroad track without right, and engaged thereon in an undertaking which may result in damage to defendant if such undertaking was not only unlawful, but constituted at least a moral wrong which might result in serious consequences. Thus a contractor engaged in erecting a building is not liable for carelessness on the part of his employees resulting in injury to a person who has gone on the premises with the intention of blowing up the building, or with the intention of removing explosives therefrom which he had previously placed there for the purpose of blowing up the building, for the law will not create a duty of care for the protection of one so engaged in doing a criminal or unlawful act or in trying to undo the consequences thereof.”

XVI.

It was error in the court to refuse defendant's requested instruction No. 11, as follows:

“No. 11. If you find that plaintiff remained on the track and endeavored to remove the hand-car from the track in order to prevent the derailment of the approaching train, and that his conduct in this respect under all the circumstances was reasonable, nevertheless, he cannot recover if the hand-car being on [114] the track was the consequence of his own wrong, if any. In other words, a person engaged in protecting life, limb or property cannot recover merely because at the very time he was in peril, he was acting under the

perils then existing, and to avert which he was engaged, when the necessity for his so doing is caused by his own negligence; that is to say, a person cannot escape the consequences of his own anterior negligence merely because at the time he was injured, he was engaged in trying to avoid the consequences to others of such negligence, and in so doing, was acting reasonably, or without negligence; in such case, his anterior negligence would continue as a cause and would bar a recovery."

XVII.

It was error in the court to refuse defendant's requested instruction No. 12, as follows:

"No. 12. You are instructed that if a person has two or more ways of accomplishing any purpose, one of which is dangerous, and the other of which is safe or less dangerous, and he unnecessarily and negligently selects the dangerous or more dangerous way, and his injury is caused in part by the choice of ways so made by him, then he is guilty of contributory negligence, and cannot recover."

XVIII.

It was error in the court to instruct the jury as follows:

To the effect that the plaintiff's negligence in using the hand-car at all, or in having the hand-car on the track where it was likely to derail the train, and whereby it would be necessary for him to remain on the track to save the train and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the

question as to whether or not he was guilty of contributory negligence must be determined by judging whether or not it was proper for him to [115] stay on the track to save the train, and that his negligence in having the hand-car on the track in the first place, or in attempting to use it, would not constitute contributory negligence, the Court's said instructions being as follows:

“The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent and that the negligence of each contributed up to and caused the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury at the time of the injury, then he cannot recover.”

“A party in the position that this plaintiff was, in bringing himself there, was guilty of contributory negligence; but, up to that time, you can put that out of sight, because, while he put himself there by his negligence, he was entitled to the rules of law governing the protection of trespassers, in so far as the law is applicable here.

If Harman remained with the hand-car in his attempt to remove the same from the track in a reasonable effort to avoid a probable disaster, if the car made disaster possible, to the approaching

train and persons riding thereon; then it is relevant for you to consider this proposition of law: the law has so high a regard for human life that it will not impute negligence to an effort to preserve, unless made under such circumstances as to constitute rashness and recklessness in the judgment of prudent persons.

But if you should consider that the engineer did not exercise an honest judgment and do all that was reasonably within his power to do, under the circumstances there disclosed, then you must consider whether this plaintiff was guilty of such rashness and recklessness in remaining upon the track in an honest endeavor to either remove his baggage or hand-car, or both, as to make himself guilty of negligence at the very moment he was struck by the engine and the hand-car; that is to say, if the plaintiff was guilty of conduct at that particular moment when he was struck, or immediately preceding it, that a prudent, reasonable man would not have done, under the circumstances, then no matter what the engineer's judgment was, or the engineer's failure was, if his negligence contributed to his own injury at that moment why then, again, the plaintiff would not be entitled to recover.

But you have a right to consider in weighing the plaintiff's conduct, this instruction that I have just given you, and that he says to you that he feared the wreckage of the passenger train, and hence he stayed with the hand-car in his efforts to remove it. Now, if that is what a prudent and

a reasonable man, animated also by a desire to save life would do, then the plaintiff would not be guilty of any neglect at that moment, depriving him of a right to recover, if the engineer of the defendant was guilty of negligence in seeking to preserve and protect him, and it caused the injury." [116]

XIX.

It was error in the Court to charge the jury that the plaintiff to have been guilty of contributory negligence proximately causing his injury must have been guilty of some act of new negligence at the very time of the injury, irrespective of whether or not any antecedent negligence of his contributed to injury or was the cause of his remaining on the track, as set forth in the Court's instructions under assignment of error No. XVIII.

XX.

It was error in the Court to charge the jury that any duty of care was owing to the plaintiff while he was a trespasser engaged in acts involving moral turpitude, or the like, to cause a wrecking of the train or injuries to the persons on it.

XXI.

It was error in the Court to charge the jury that the plaintiff's negligence in having the hand-car on the track where it was likely to derail the train, and whereby it would be necessary for him to remain on the track to save the train, and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the question as to whether he was guilty of contributory neg-

ligence must be determined by judging whether or not it was proper for him to stay on the track to save the train as set forth in the Court's instructions under assignment of error No. XVIII.

XXII.

It was error in the Court to charge the jury that though the plaintiff knowingly used the track and push-car, knowing that the same might derail the approaching train, the defendant, under such circumstances, would owe to him the duty to exercise any degree of care to avoid injury to him. [117]

WHEREFORE THE DEFENDANT PRAYS that said petition for a writ of error be granted and that for the reasons aforesaid and for divers and sundry other reasons that the judgment entered herein on the 18th day of July, 1913, the same also having been suspended by the filing of defendant's petition for a new trial on the 22d day of August, 1913, and re-entered by the order denying the defendant a new trial made and entered herein on the 10th day of January, 1914, be reversed.

VEAZEY & VEAZEY,

Attorneys for Defendant, Great Northern Railway
Company, Plaintiff in Error.

Filed Jan. 13, 1914. Geo. W. Sproule, Clerk.
[118]

And thereafter, on January 13, 1914, Petition for Writ of Error was duly filed herein, being as follows, to wit: [119]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Petition for Writ of Error.

Great Northern Railway Company, the defendant in the above-entitled cause, conceiving itself aggrieved by the judgment rendered in the District Court of the United States, in and for the District of Montana, in said cause on the eighteenth day of July, A. D. 1913, and complaining that in the record and proceedings had in said cause, and also in the rendition of said judgment, manifest error hath happened, to the great damage of said defendant; as more fully appears from the Assignment of Errors, which is filed with this petition, comes now and petitions the above-entitled Court for an order allowing said defendant to prosecute a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such Writ of Error may issue in this behalf out of said Circuit Court of Appeals, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly au-

thenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and also that an Order may be made fixing the amount of security which said defendant shall give and furnish upon said [120] Writ of Error, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals, and for such other and further Order as to the Court may seem just.

VEAZEY & VEAZEY,
Attorneys for Defendant.

Great Falls, Montana, Jany. 13, 1914.

Filed Jan. 13, 1914. Geo. W. Sproule, Clerk.
[121]

And thereafter, on January 13, 1913, Order Allowing Writ of Error was duly made and entered herein, being as follows, to wit: [122]

*In the District Court of the United States, in and
for the District of Montana.*

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Order Allowing Writ of Error.

At a stated term, to wit, the Nov. term, A. D. 1913, of the District Court of the United States in and for

the District of Montana, held at the city of Helena, in the State and District of Montana, on the 13th day of January, A. D. 1914.

Present, the Hon. GEORGE M. BOURQUIN, District Judge.

This day came the defendant, by its attorneys, and filed herein and presented to the Court, and its Judge, the petition of said defendant praying for the allowance of a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and an Assignment of Errors setting forth the errors intended to be urged by said defendant, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow said Writ of Error, and it is ordered that a Writ of Error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered and entered herein on the eighteenth day of July, A. D. 1913, being a day of the [123] April term of said District Court, and that the amount of bond on said Writ of Error be and hereby is fixed at the sum of Thirty-five hundred (\$3500.00) dollars, which said bond shall operate as a supersedeas bond, and that upon said defendant, Great Northern Railway Company, plaintiff in error, filing with the

Clerk of this court a good and sufficient bond in the said sum of Thirty-five hundred dollars, approved by this Court, or its Judge, execution on said judgment shall be, and hereby is, stayed and all further proceedings in this court shall be, and they hereby are, suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals.

Done in open court this 13th day of January, A. D. 1914, and ordered entered as above.

GEO. M. BOURQUIN,

United States District Judge for the District of Montana.

Filed and entered Jan. 13, 1914. Geo. W. Sproule, Clerk. [124]

And thereafter, on January 13, 1914, Bond on Writ of Error was approved and filed herein, being as follows, to wit: [125]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That Great Northern Railway Company, by Veazey & Veazey, its attorneys, as principal, and National

Surety Company, a corporation, duly organized and incorporated under the laws of the State of New York (with the capital and assets provided for in an act of the Sixth Legislative Assembly of the State of Montana entitled "An Act to Permit Foreign Surety Companies to do Business in this State and Regulating the Method Thereof," for the purpose, among other things, of transacting business as a surety or undertakings of persons and corporations, and the acts supplemental thereto or amendatory thereof, which said corporation has complied with all the provisions of said act and acts), as surety, are held and firmly bound unto Charles Harman, the plaintiff in the above-entitled cause, his executors, administrators and assigns, in the penal sum of Thirty-five Hundred (\$3500.00) Dollars, for the payment of which amount well and truly to be made to the said Charles Harman, his executors, administrators and assigns, the said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly, by these presents.

Dated this 13th day of January, A. D. 1914.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

WHEREAS, the above-named Great Northern Railway Company has [126] prosecuted, or is about to prosecute, a Writ of Error out of the United States Circuit Court of Appeals for the Ninth Circuit to have reviewed by said United States Circuit Court of Appeals, and to reverse the judgment in the above-entitled cause rendered and entered by the United States District Court for the

District of Montana on the eighteenth day of July, A. D. 1913, in favor of the plaintiff, Charles Harman, and against the defendant, Great Northern Railway Company.

NOW, THEREFORE, if the above-named Great Northern Railway Company, defendant in said cause and plaintiff in error, shall prosecute its said Writ of Error to effect and answer all damages and costs if it should fail to make its plea good, then this obligation shall be void, otherwise it shall remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY,

By VEAZEY & VEAZEY,

Its Attorneys.

NATIONAL SURETY COMPANY,

[Seal]

By W. S. FRARY,

Its Duly Authorized Attorney in Fact.

The foregoing bond is hereby approved as to form and sufficiency and in all things, this 13th day of January, A. D. 1914.

GEO. M. BOURQUIN,

United States District Judge for the District of Montana.

Filed Jan. 13, 1914. Geo. W. Sproule, Clerk.

[127]

And thereafter, on January 13, 1914, a Writ of Error was duly issued herein, which is hereto annexed, and is in the words and figures following, to wit: [128]

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable the District Court of the United States, for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, or some of you, between Charles Harman, defendant in error and plaintiff in said District Court, and Great Northern Railway Company, plaintiff in error and defendant in said District Court, manifest error hath happened to the great damage of said defendant, and plaintiff in error, Great Northern Railway Company, as by its petition and Assignment of Errors appears, we, being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San

San Francisco, in the State of California, within thirty days from the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, and the seal of the District Court of the United States for [129] the District of Montana, this 13th day of January, in the year of our Lord, one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal]

GEO. W. SPROULE,

Clerk of the United States District Court for the District of Montana.

Due personal service of the foregoing Writ of Error made and admitted and receipt of copy acknowledged this 17 day of January, A. D. 1914.

MAURY, TEMPLEMAN & DAVIES,

Attorneys for Charles Harman, Plaintiff in Said District Court and Defendant in Error. [130]

Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said court, to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, at the day and place within contained, in a certain schedule to this, writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,

Clerk. [131]

[Endorsed]: No. 306. In the District Court of the United States for the District of Montana. Chas. Harman vs. Great Nor. Ry. Co. Writ of Error. Copy Lodged with Clerk. Filed Jan. 13, 1914. Geo. W. Sproule, Clerk. [132]

And thereafter, on January 13, 1914, a Citation was duly issued herein, which is hereto annexed, and is in the words and figures following, to wit: [133]

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

Citation on Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Charles Harman, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, and at a session thereof, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein Great Northern Railway Company, defendant in said District Court, is plaintiff in error, and you, the said

Charles Harman, plaintiff in said District Court, are defendant in error, to show cause, if any there be, why the judgment rendered against said defendant, plaintiff in error, and in favor of said plaintiff, defendant in error, in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. GEORGE M. BOURQUIN, United States District Judge, for the District of Montana, this 13 day of January, A. D. 1914.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

Due personal service of the foregoing Citation made and admitted and receipt of copy acknowledged this 17 day of Jan. A. D. 1914.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Charles Harman, Plaintiff in Said District Court and Defendant in Error. [134]

[Endorsed]: No. 306. Charles Harman vs. Great Nor. Ry. Co. Citation. Filed Jan. 17, 1914. Geo. W. Sproule, Clerk. [135]

And thereafter, on January 24, 1914, an Order as to exhibits was duly made and entered herein, in the words and figures following, to wit: [136]

*In the District Court of the United States in and
for the District of Montana.*

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

Order Directing Transmission of Original Exhibits.

It appearing to the undersigned, the presiding Judge of the above-entitled court, presiding in the above-entitled cause at the trial thereof, that it is proper that the original exhibits hereinafter described, used on the trial in the above-entitled cause, should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the writ of error sued out by the above-named defendant to have reviewed the judgment of the above-entitled court by the said Circuit Court of Appeals.

On motion of counsel for defendant, and pursuant to stipulation,

It is ordered that the Clerk of the above-entitled court transmit to said Circuit Court of Appeals the said original exhibits introduced in evidence, consisting of all photographs offered and received in evidence on the trial of the above-entitled cause and of the tape showing the speed of the engine referred to in the Bill of Exceptions as the engine of the train which caused plaintiff's injuries, so that he may

have the same in the said Circuit Court of Appeals with the transcript of the record in this cause. The said exhibits being more specifically identified by number as Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and Defendant's Exhibit 10.

Dated Jan. 24, 1914.

GEO. M. BOURQUIN,

District Judge for the District of Montana.

Filed and entered Jan. 24, 1914. Geo. W. Sproule,
Clerk. [137]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 138 pages, numbered consecutively from 1 to 138, inclusive, is a true and correct transcript of the pleadings, process, verdict and judgment, and all other proceedings had in said cause, and the whole thereof, as appear from the original record and files of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause and transmit herewith original exhibits pursuant to order.

I further certify that the costs of the transcript of record amount to the sum of Thirty and 25/100 Dollars (\$30.25), and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Helena, Montana, this 26th day of January, A. D. 1914.

[Seal]

GEO. W. SPROULE,
Clerk. [138]

[Endorsed]: No. 2372. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. Charles Harman, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received and filed February 2, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

CHARLES HARMAN,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

I.

STATEMENT OF THE CASE.

(1)

*Short Review of Nature of Action, and of Points
to be discussed in the Brief.*

This action was brought by the defendant in error, for convenience here designated as plaintiff, a stranger to the plaintiff in error, here designated as defendant railway company, to recover compensation for personal injuries received by him, by reason of a collision between a passenger train and a push car which he had appro-

priated wrongfully, unlawfully and with admitted knowledge on his part of the serious consequences to others which might thereby result, and which he was pushing around a curve, constituting, according to his complaint, an obscure place, into which, at the time, a regular passenger train was approaching at an admitted distance of less than five hundred feet, and at a speed of from thirty-five to forty-five miles an hour. He alleges in his complaint (Tr. p. 2-5) that his injuries were due to the negligence of the engineer in the operation of the train. These are in substance the facts alleged in the complaint which the plaintiff sought to prove at the trial, and upon the plaintiff's attempted proof of which the court allowed a recovery.

The answer (Tr. p. 8-13) denied negligence and set up contributory negligence, which latter affirmative defense was denied by the reply (Tr. p. 14-15).

The writ of error (Tr. p. 144-145) is sued out by the defendant railway company to review a judgment of the United States District Court for the District of Montana (Tr. p. 18-19) entered upon a verdict of the jury (Tr. p. 17) in favor of the plaintiff. The assignment of errors (Tr. p. 126-137) which accompanied the petition for the allowance of the writ (Tr. p. 138-139) sets forth the errors urged in the specification of errors in this brief, as such errors are re-grouped.

These errors are divided into five parts.

In the first group are assignments relating to exceptions taken by the defendant (Tr. p. 49, 100) to the action of the court in overruling (Tr. p. 49) the motion of the defendant for a judgment of non-suit and dismissal at the end of plaintiff's case (Tr. p. 45-49), and in overruling (Tr. p. 100) a similar motion after all the evidence had been introduced (Tr. p. 99-100), and to the exception (Tr. p. 100) to the refusal of the court to give an instruction to the jury directing a verdict for the defendant (Tr. p. 100).

The second group also relates to the issue of negligence, and presents for review the refusal of the court to withdraw from the jury certain theories of negligence advanced by the plaintiff, in that, for example, the court refused over defendant's exception (Tr. p. 102) an instruction advising the jury that the engineer could not, under the evidence, be found negligent in the matter of checking the speed of his train (Tr. p. 100); secondly, that the evidence conclusively rebutted plaintiff's theory that the engineer could have obtained an emergency application of the air brakes, and it was therefore error in the court to refuse over defendant's exception (Tr. p. 102) an instruction requested by defendant, advising the jury accordingly (Tr. p. 102); and third, that it was error in the court over defendant's exception (Tr. p. 101) to refuse to instruct

the jury, as requested, that, under the evidence, it was not the duty of the engineer, as advanced by the plaintiff, to reverse his engine (Tr. p. 101), the evidence showing beyond dispute that if this had been done, as contended by the plaintiff, the retarding power would have been diminished, rather than increased. The last error in this group is the assignment that the verdict is against law, in that the court charged the jury (Tr. p. 112 l. 15-p. 113 l. 8; p. 120 l.-p. 121 l. 2), that there could be no recovery unless it was established by the evidence that the engineer failed to exercise an honest judgment, but the proof was uncontradicted that he did exercise at least an honest judgment.

The remaining specification of errors (Groups III, IV and V) relate to the law applicable to the facts in this case on the issue of negligence and contributory negligence under the admitted proof that the plaintiff, a stranger to the railway company, was a trespasser and unlawfully and recklessly, and without any excuse or right, appropriated and operated over a railroad track of a common carrier, an instrument dangerous to the life of the engineer and passengers on an approaching train.

Thus, specifications in group III relate to the refusal of the court to rule that the law of negligence has not yet been extended to such a case, and that in such a case the law would not throw

about the plaintiff a protecting duty to use care for his safety on the part of those whose safety he was so recklessly and indifferently imperiling, and that the defendant could not be held, except for a wilful or intentional injury to him. This group includes exceptions (Tr. p. 118 l. 20-p. 119 l. 8) to the court's charge (Tr. p. 110 l. 19-p. 112 l. 21) that any duty of care was owing to the plaintiff by the engineer.

Groups IV and V present for consideration the bearing of the same facts on the issue of contributory negligence, and to the exceptions to the refusal of the court to charge that the negligence of the plaintiff in using the car might be a cause of the accident (Tr. p. 102 l. 28-p. 104 l. 9; p. 105 l. 19-p. 106 l. 13), and to the charge of the court (Tr. p. 114 l. 18, p. 115; p. 110 l. 6-18) to the effect that such negligence positively could not be a cause of the accident, and that, conceding that such action on the plaintiff's part was negligence, the jury should "put that out of sight," and consider as the test for plaintiff's contributory negligence merely whether he was guilty of some new act of negligence after the train came in sight, or "at the particular time he was struck," and that the test in this regard was whether, under the proof that he remained on the track in an effort to take the car off to save his baggage and prevent a derailment of the train, he acted reasonably, bearing in mind that the

law has such a regard for life and property that it would not impute negligence to an effort to save either, if the person acted reasonably in his said efforts.

These last three groups of specifications will be considered more carefully after the evidence has been reviewed, and the court thereby obtained a better insight into the nature of the case.

(2)

A Review of the Evidence in connection with the Specification of Errors.

The testimony at the trial, in so far as it is necessary to review the same in connection with the errors assigned, shows that the plaintiff, who had all his life, more or less, helped in railroad construction work, and was therefore reasonably familiar with the dangers incident to the operation of trains, and to the necessity of the track being free from obstructions (Tr. p. 21 l. 4-12; p. 29 l. 28-p. 30 l. 12), came to Montana to work as a carpenter for the Bates & Rogers Construction Company (Tr. p. 21, l. 13-23) in lining a tunnel of the defendant railway company near Basin, Montana, and was discharged from the employment of the Bates & Rogers Company at about eight-thirty in the morning of the day before the accident (Tr. p. 32, l. 7-9; p. 29, l. 9-12), and on the next day he intended to take the work train south about four miles to Basin, the nearest town, where he intended to take a passenger train

for Butte (Tr. p. 30 l. 17-19). He thus allowed the four passenger trains (two in each direction) of the day before, and the work trains of that day to go by, without any effort to take them, and he missed the work train on the morning in question. These trains all stopped regularly at the tunnel (Tr. p. 30 l. 31-p. 31 l. 1; p. 60 l. 4-7).

He had worked at the tunnel for two weeks (Tr. p. 22 l. 2-4), and a large part of the time was spent in work outside the tunnel on false work near a highway to Basin crossing under the tracks right at the tunnel (Tr. p. 29 l. 14-27), so he knew of the schedule time of trains and of the existence of the highway to Basin, which highway could be seen right from the tracks (Tr. p. 29 l. 24-27; p. 30 l. 11-16).

Having missed the work train, he and his companion appropriated a push car at the tunnel as a means of carrying their baggage to Basin (Tr. p. 22 l. 11-12). This is frequently termed in the evidence, for convenience, a hand car, but it was not an ordinary hand car, but technically a push car (Tr. p. 52 l. 6-7). It was such a heavy conveyance that its presence on the track would be very apt to derail an engine or train (Tr. p. 26 l. 29-p. 27 l. 3), and for this reason no one is allowed to have a push car on the track except by first telephoning to, and obtaining an order from, the dispatcher authorizing its use (Tr. p. 52 l. 24 p. 53 l. 9), and in approaching a curve, a rail-

way employe operating a push car would be required to have a flag far out ahead (Tr. p. 53 l. 6-9). It was operated, not by pump handles, but by the persons using the same walking on the ground and pushing it ahead of them. The plaintiff himself admitted that he recognized the possible enormity of the unlawfulness of his act in appropriating the car and operating it on the track, because he conceded that it would derail the train (Tr. p. 26 l. 29-p. 27 l. 3), and he says he remained on the track after the train came in sight in an effort to get the car off the track to prevent a derailment of the train, because, he says, he "thought he would get into very serious trouble," (Tr. p. 26 l. 29-31).

The baggage of himself and his companion consisted of a tool box and a roll of bedding in one roll, and a roll of bedding of the plaintiff and a suit case (Tr. p. 22 l. 16-17; p. 31 l. 17-26). This baggage was described as stuff which he "did not feel justified in throwing away" (Tr. p. 22, l. 16-17).

He knew that trains might come along at any moment, not only because of the time that he had worked there, all the time being employed on day shift from seven in the morning until six at night (Tr. p. 29 l. 8-12), but also because the train which struck him was running just about on time, not to exceed five minutes late (Tr. p. 44 l. 11; p. 52 l. 2-3; p. 54 l. 27-28; p. 66 l. 1), and he said

that, as he and his companion pushed the car ahead of them over the rails and up grade on the way to Basin, they kept a sharp and constant lookout for trains (Tr. p. 31 l. 7-13). The only excuse offered by the plaintiff for the enormity of his act in thus appropriating the push car, and recklessly operating it over the rails in the face of an onrushing scheduled passenger train, was that he wanted something to carry his baggage on, which he did not feel justified in throwing away (Tr. p. 22 l. 11-20).

It is true that he claimed that the stealing of the push car was the only available means he had of getting away from the tunnel to Basin (Tr. p. 22 l. 12-15), because he supposed that if he had taken the county road, which ran right up to the place where he was working, and follows the tracks (Tr. p. 30 l. 12-16; p. 29 l. 24-27), it might be necessary for him to ford creeks, though he had never examined the road at any time. He gave no excuse at all for not taking the trains already referred to on the day before. He admitted that ranch teams passed the place (Tr. p. 31 l. 1-3), and he said that the only reason he did not take a livery team was because he did not have the money with him to pay for a livery team (Tr. p. 30 l. 17-30), but he admitted that he was trying to get to Basin to get a train from there to Putte, and that he had a certificate of deposit with him for one thousand dollars (Tr. p. 30 l.

28-29; p. 50 l. 7-12), which was the certificate of deposit found upon him when he was afterwards received at the hospital.

It is unnecessary to review further the testimony negating the theory sought to be developed by plaintiff's counsel, that the unlawful and reckless appropriation of the hand car was a necessary act,—in spite of the highway, in spite of the passenger trains and work trains of the day before, in spite of the work trains and other trains which would be stopping on the day in question, in spite of the ranch teams, and in spite of his ability to get a livery team through his certificate of deposit, for the court instructed the jury (Tr. p. 107 l. 1-p. 106 l. 14) that this theory of the case was not sustained—that the plaintiff had plenty of ways out, and that the appropriation and use of the push car was unlawful, and that the plaintiff was a trespasser.

The story of what occurred afterwards, and of the plaintiff's realization of the dangers to which he was subjecting others, is best told in the following abstract of his own words, taken from the record:

We were traveling on the ground, pushing the hand car along over the rails (Tr. p. 24, l. 25-27). As I was going there, along over that track, we kept a view up the track quite a little way to the best of our ability. To the best of our ability we were keeping a constant lookout as we operated the car to see whether there were any trains (Tr. p. 31, l. 8-14). On the way along the track this

man (that accompanied him) had cautioned me about helping him get the hand car off if the occasion arose. I could not have done anything with the hand car myself (Tr. p. 36, l. 12-15 and 18-20).

The railroad follows the creek beds, and consequently it is necessarily a very crooked railroad (Tr. p. 23, l. 16-17). The place from which the train came was on a curve and necessarily obscure (Tr. p. 23, l. 31 to p. 24, l. 4). I would say the curvature was about six degrees (Tr. p. 36, l. 21). The train was coming down grade and we were going up grade (Tr. p. 36, l. 23-24). I would say the grade of the track was about a two per cent grade from Basin to the tunnel (Tr. p. 25, l. 4-6).

We saw the engine just as it was rounding the curve and coming into view (Tr. p. 31, l. 10-12). I first saw the train when it was within four or five hundred feet of the hand car we were pushing. The train was then coming from a curved track. We were on a curved track also (Tr. p. 23). When I first saw the engine it was about four hundred feet away (Tr. p. 25, l. 2-4). It was astounding to me when the fact was put to me that we and the oncoming train were liable to meet (Tr. p. 23, l. 24-26). When we first saw the train coming we took our baggage and tool box off, and endeavored to get the hand car off (Tr. p. 24, l. 31 to p. 25, l. 2). I suppose I could have gotten into the clear myself if I had left the hand car on the track, but I thought of getting into very serious trouble if I left the car on the track and thereby wrecked the train. If I had left the car on the track the effect would have been nothing other than wrecking the train.

These statements having been made by the plaintiff himself, it is unnecessary to review the evidence of other witnesses in reference thereto.

(3)

*Further Review of Transcript as to Errors in
Last Three Groups in Specification arising
under above Narrative of Nature of Case.*

It appears from the brief review of the evidence showing the nature of the case that the plaintiff was a trespasser, pure and simple, and the court so charged. It further appears that in operating or appropriating the push car he had no excuse, and the court so charged and he was guilty of negligence, which negligence the court characterized as contributory negligence (Tr. p. 114 l. 18-20), but the court declined, as will now be shown, to allow this to bar the plaintiff's recovery, and, on the contrary, expressly charged the jury to "lay it aside" (Tr. p. 114 l. 18-24).

It also appears that the plaintiff's unlawful appropriation of the car was made with full knowledge of the perils to which he thereby subjected the engineer and the passengers upon the train, and that his conduct was not merely negligent, but involved moral turpitude or obliquity.

We will now exhibit more in detail the views of the law which we presented to the court for decision in the light of these facts.

First, we contended in requests for instructions to the jury on the issue of negligence (as well as on the motion for judgment) that, under these circumstances, for the benefit of a person so engaged, the law would not throw about the

plaintiff a protecting duty of care on the part of others, especially on the part of those who were imperiled by his unlawful conduct. It was not a question of intentional injury to the plaintiff. It was at most a matter of an alleged failure to use care, and we contended that, under such circumstances, while the law would not permit the plaintiff to be intentionally injured or punished by those whose very lives he threatened, the law certainly should not recognize a duty on their part to use care for his protection. By using the car at all, and by placing it on the track as an obstruction, barring the progress of the train, which had the absolute right to a necessarily unobstructed passage, the plaintiff was guilty of a very great wrong to the engineer and passengers, and if thereby the engineer or passengers had sustained injury, they would have had a cause of action against the plaintiff, not the plaintiff against them.

In so far, therefore, as the plaintiff remained on the track to remove the obstruction placed there by him, he was but undoing the consequences of his own wrongful act, and preventing the accrual of causes of action, both criminal and civil, against him. For unintentional injuries received by him while so engaged, he should not be permitted to recover.

By analogy, clearly the owner of a building in course of construction would not be liable for a

workman's mere negligence in dropping a heavy bar upon a plaintiff, whose presence in the building was unknown, if, at the time, the plaintiff, in repentance, had returned to the building to remove a bomb which he had placed there with the object of destroying the building. Clearly also, if a person, who had tied logs across a track with the intention of stopping a train so as to rob it, should, in repentance, return to the track, and receive injuries in endeavoring to remove the logs in the face of an oncoming train, he would not be permitted to recover, or seek to prove that the engineer of the train which he intended to rob perhaps failed to use all care to stop the train.

By its requested instructions numbered 8, 9 and 10 (Tr. p. 103-105) defendant presented to the court these views, that the law would not throw a protecting duty of care about a person so engaged in acts involving moral turpitude, but would, at most, let the burden rest where it fell, but each of these instructions was refused (Tr. p. 103-105), and the court, over objection by defendant (Tr. p. 118 l. 20-p. 119 l. 8), gave instructions to the jury that the defendant did owe a duty of care to the plaintiff (Tr. p. 110 l. 19-p. 112 l. 15). These errors constitute the basis for the third group of errors found in the specification of errors, in which specification the instructions referred to are, of course, set out at length.

Secondly, this matter of plaintiff's unlawful conduct also came up in connection with the issue of contributory negligence.

On this issue, in its requested instructions numbered 5, 6, 7 and 11 (Tr. 101-103; 105-106), the defendant presented to the court its view of the law of contributory negligence in the light of the facts already reviewed. The refusal of the court to give these requested instructions, and defendant's exceptions thereto. (Tr. p. 101-103; 105-106) constitutes the basis of the fourth group of errors specified, and the instructions given by the court on the subject, (see specification V A) and defendant's objections and exceptions thereto (Tr. p. 119 l. 9-17 to p. 122 l. 12-p. 123 l. 13) constitute the basis of the fifth group. These instructions, either requested or given, are set forth in full in the specification of errors. It is convenient here to merely summarize them.

We bear in mind that the court positively instructed the jury that, in using the hand car at all, and in its operation, the plaintiff was guilty of contributory negligence. By requested instruction numbered 5, accordingly, we asked the court to charge the jury that, if this negligence of the plaintiff contributed to cause the injury, the plaintiff could not recover, but the court refused this charge (Tr. p. 102 l. 9-14), and instructed the jury (Tr. p. 110 l. 6-18; p. 114 l. 18-p. 115) that recovery would be barred only as the negli-

gence of the plaintiff continued “up to” and caused the injury, and that they must consider only negligence of the plaintiff “at the time of the injury.” The instruction given by the court is fully set forth under specification III A.

Again, as the court seemed to be of the opinion that this case was analogous of a person who had become unconscious on a railroad track and that the engineer had the last clear chance to avoid the injury, we called the court's attention to the distinguishing feature of this case, in that the plaintiff was at all times present and in full possession of his mental faculties and acting deliberately (Tr. p. 102 l. 15-22), but the court refused our requested instruction numbered 6 on this matter, bringing out this distinction, and our exception was duly preserved (Tr. p. 102 l. 22-27).

Again, the court was asked to rule in requested instructions numbered 7 and 11 (Tr. 102-103; 105-106), that, if the plaintiff was guilty of negligence in having the hand car on the track, and this negligence threatened or imperiled persons on the approaching train, so that it was necessary for him to remain on the track to remove the hand car, his own wrongful and unlawful appropriation and use of the hand car would be the cause of it being necessary for him to remain on the track, according to his theory, and would continue as the cause of his injury.

The court, however, refused all of these instructions, to which ruling the defendant took an exception (Tr. p. 103 l. 9-13; p. 106 l. 9-13), and instructed the jury as set forth in the errors assigned in the fifth group, that "the plaintiff was there as a trespasser upon the track of the railroad company (Tr. p. 107, l. 13-14). Under the circumstances he had no right to go there, and was, therefore, what is termed in law a trespasser" (Tr. p. 108, l. 12-14). The court then instructed the jury, that "this plaintiff, in bringing himself there, was guilty of contributory negligence, but up to that time, you can put that out of sight" (Tr. p. 114, l. 18-21), and that, before his negligence would bar a recovery, it must be negligence contributing "up to" and causing the injury, and must be negligence "at the time of the injury" (Tr. p. 110, l. 8-18), and that the question as to whether or not he was negligent would depend solely upon whether or not he was negligent in remaining on the track to remove the car or his property, and that, in this connection, the jury should remember that the law had such a high regard for life and property that negligence would not be imputed to one engaged in rescuing it, and that the test was merely whether the plaintiff was acting rashly and recklessly in remaining on the track to remove his baggage or the car "at the very moment he was struck by the engine," and that the test of negli-

gence was whether he was negligent “at the particular moment when he was struck”—whether “at that time” he was negligent.

It is not surprising that in the light of these instructions, the jury returned into court with the request that the court give them further instructions on the issue of contributory negligence (Tr. p. 119, l. 29-32), and the court repeated its instructions (Tr. p. 121) that it was for the jury to determine whether the plaintiff acted as a reasonably prudent man in endeavoring to remove the hand car or baggage, and that, if he was not justified in so acting, but, on the contrary, his conduct was imprudent to the extent of being rash and reckless, then the plaintiff would be guilty of contributory negligence. The defendant objected and excepted (Tr. p. 122-123) to these instructions, on the grounds heretofore urged, and also on the ground that it made the test of plaintiff's contributory negligence, whether he was reckless or rash, and not whether he merely failed to exercise ordinary care, but the court overruled these objections (Tr. p. 123).

(4)

More Detailed Review on Evidence as to Negligence on the part of the Engineer.

As regards the negligence charged in the operation of the train, the evidence showed that the train was going at a speed of from thirty-five to forty-five miles an hour (Tr. p. 54 l. 27-29); the

engineer estimated the speed at between thirty-five and forty miles an hour (Tr. p. 54 l. 27-29); and the speed tape carried on the engine showed a speed of forty-five miles an hour (Tr. p. 57-59; p. 82). The plaintiff did not estimate the speed at the time the engine appeared, but says that while he was struggling with the car, the other man got in the clear, and the train hit the car and shoved it against the plaintiff, breaking his leg. Under these circumstances, he estimated the speed at from sixteen to twenty miles an hour when the train went by him (Tr. p. 25; p. 33). He did not at any time get a good look at the train (Tr. p. 28 l. 2), and concentrated his attention on removing the push car (Tr. p. 32 bottom 233). He had no opportunity to judge the speed. All concede that the track was down grade and the plaintiff estimates the descent as a two per cent grade (Tr. p. 25 l. 4-7).

The photographs show the conditions and what a slight chance the engineer had to save himself, much less the plaintiff. Exhibit 7 shows a clear view of the scene of the accident. The train was coming from the west around the curve at the left hand side of the picture, and was being operated easterly towards the bottom of the picture (Tr. p. 27, l. 21-26). The place where the car was struck was about midway between a telegraph pole and a rock shown on the left hand side of the track as you look at the picture. The picture represents

Harman's view as he proceeded along the track (Tr. p. 37). This photograph should be compared with photograph 9, taken from a point further east. The view of the engineer is indicated by photograph 4 looking from the west at about bridge 123, long before the curve is reached. Then photograph 5 shows the engineer's view still further east, as he entered the curve, and photograph 6 shows the engineer's view when he was well into the curve (Tr. p. 37 and 38).

The engineer testified that just as he got to the curve, he put on four or five pounds of air to "brace" the train (Tr. p. 55 l. 1-12), the object being to draw the train together, so that it will cling to the outer rail. Without this application, which is called a service application, the train, in coming into the curve, will knock back and forth from one rail to the other, making the riding very rough. This operation serves to steady the train, and is the regular practice (Tr. p. 51 l. 12-27 p. 55 l. 1-12). After such an application is made, the brake mechanism has been so started into operation that thereafter it would be impossible, mechanically, (Tr. p. 56; p. 85 l. 24-26), to get an emergency application (Tr. p. 55 l. 25). The plaintiff sought at length to prove by cross-examination that an emergency application could have been maintained under the New York air brake system (Tr. p. 62 l. 24-p. 63), but the evidence was conclusive in this regard that it was

mechanically impossible after a service application (Tr. p. 79 l. 17-22; p. 78 l. 22; p. 79 l. 17). The plaintiff also contended that the engineer should have reversed his engine, but it was shown that this would retard, and not increase the efficiency of the stopping power (Tr. p. 63 l. 27-p. 64 l. 17; p. 77 l. 23-p. 78 l. 22; p. 78-81), and was forbidden in the standard text books as a less effective way of stopping the train (Tr. p. 78). The engineer testified that he was looking ahead as he was going around the curve, and when he got into the curve and got a view around the curve, he saw two men on the push car, cross-wise of the track, throwing baggage off (Tr. p. 55 l. 12-19; p. 43-45). He saw them as soon as he could (Tr. p. 45 l. 3-4). He was then about five hundred feet away (Tr. p. 55 l. 17-19), and put the brake valve into the emergency position, but could not get an emergency pressure, and did all in his power to stop (Tr. p. 55 l. 22-28 p. 57 l. 14-15; p. 59 l. 1-3; l. 16-17; p. 71 l. 6-12; p. 72). Then he blew the stock whistle—rip, rip, rip, rip—and as he drifted down, yelled at the men “like an Indian” to get out of the way (Tr. p. 57 l. 6-16 p. 61 l. 29-31; p. 62 l. 14-16; p. 71 l. 6-23; p. 72). The engine, however, hit the car, and threw it against the plaintiff (Tr. p. 57 l. 17-19). After passing, the engineer released the air, (Tr. p. 60 l. 8-15) so as to avoid jarring the passengers, (16 u. 57 l. 6), and stopped slowly. The rail was a wet

rail (Tr. p. 56), which makes a stop harder. All concede that it was a snowy, sleety day (Tr. p. 66 l. 20-21 p. 51 l. 28-p. 52 l. 1; p. 53 l. 20-21; p. 55 l. 3; p. 61 l. 25-29 p. 69 l. 17-18 p. 68 l. 5-6 p. 71 l. 26-27). The plaintiff himself admitted this.

The foregoing facts, testified to in the main by the engineer, are practically undisputed. The remaining testimony was theoretical testimony as to what could be done.

The plaintiff contended that the train was not stopped as soon as possible, and the court submitted this issue to the jury, on the testimony of the plaintiff himself, and of a witness named Lynes, a discharged engineer, testifying as an alleged expert. The testimony offered on this point was not worthy of credence, and was evasive and meaningless. Thus, the plaintiff testified that the train, the speed of which he could not and did not estimate, should have been stopped in its length (Tr. p. 65, l. 16-19). He then added that he had seen heavy trains stopped within ten or fifteen feet, going twenty-five or thirty miles an hour (Tr. p. 25, l. 22-24). He estimated that a train going twenty miles an hour should be stopped by a good man in a train length, by the use of the *reverse lever* and the air brake (Tr. p. 33). The other witness for the plaintiff was the witness Lynes, formerly a railroad engineer, who testified that the train, under favorable conditions, running forty miles an hour, should have been

stopped in three hundred feet by the emergency application, and in not to exceed four hundred feet by the service application (Tr. p. 84-85). He then claimed that the Westinghouse tests showed that, by emergency applications of the Westinghouse brake, trains going forty miles an hour, could be stopped in less than two hundred feet (Tr. p. 85). He based this upon tables which he said existed. (Tr. p. 85-86). He produced the tables (Tr. p. 90-93), but was, however, unable to explain them. (Tr. p. 88). They, in fact, showed, in the only exclusive passenger train test, that it took seven hundred and sixty-seven feet to stop a train going forty-three miles an hour by the emergency application, and in other passenger tests it took from five hundred and forty-seven to eight hundred and ninety feet in which to stop a passenger train going from thirty-eight to forty-five miles an hour (Tr. p. 86-93), and in the Westinghouse tables produced by the defendant it took from five hundred sixty-seven to six hundred eighty-eight feet (Tr. p. 96; p. 93-99). All these are emergency applications, with the distance estimated from the very point when the application was made to the exact point of the stop.

In this case, it is conceded, however, that the maximum distance from the time when the engine first came around the curve to the point where the plaintiff was, was five hundred feet.

(Tr. p. 23 l. 31-p. 24 l. 4 p. 55 l. 12-19; p. 24 l. 31-p. 25 l. 4).

The witness Lynes admitted that he had never himself made the stops he testified to, or been called upon to make emergency stops (Tr. p. 86, l. 11-17). He had been an engineer in the service of the defendant company, but was dismissed because of several accidents—over three in number—in which collisions occurred, because he did not stop his train in time (Tr. p. 86), and later was nevertheless given another chance on the Northern Pacific, and was in another accident, when it was claimed that he did not stop his train in time, and was dismissed by that company (Tr. p. 86).

He was evasive in testifying in one instance that he had himself stopped a train going forty-five miles an hour in a less distance than two hundred feet, but later examination forced the absurd admission that the stop was caused by a collision (Tr. p. 86-87). He admitted that he had not himself seen emergency stops by trains, going forty-five miles an hour, stop in three hundred feet by the brakes (Tr. p. 87), and stated that he based his opinion upon the tables, and knew nothing about the tables, except what they contained in themselves (Tr. p. 87).

The defendant's engineer said that he had never made an emergency application, but placed the minimum distance within which a stop could be

made at nine hundred feet (Tr. p. 56 l. 26-p. 57; p. 60; p. 65 l. 1-l. 15). Defendant's master mechanic estimated the possible distance in which a stop was mechanically possible at seven hundred feet (Tr. p. 82 l. 1-12), with everything working well, and conditions favorable. All this related to emergency applications.

This evidence will be reviewed but slightly in the brief of the argument.

II.

SPECIFICATION OF ERRORS.

I A

It was error in the Court to overrule defendant's motion for a judgment of nonsuit and dismissal upon the merits at the close of plaintiff's case. (Tr. p. 45-49).

I B

It was error in the court to overrule defendant's motion for a judgment of nonsuit and dismissal on the merits, at the close of all the evidence. (Tr. p. 99-100).

I C

It was error in the court to refuse defendant's requested instruction No. 1, as follows. (Tr. p. 100):

"No. 1. You are instructed to return a verdict for defendant."

II A

It was error in the court to refuse defendant's

requested instruction No. 2, as follows. (Tr. p. 100):

“No. 2. You are instructed that under the evidence, the engineer did all in his power, or at least exercised reasonable care in the matter of checking the speed of the train, and you cannot find him negligent in this regard.”

II B

It was error in the court to refuse defendant's requested instruction No. 3, as follows. (Tr. p. 101):

“No. 3. You are instructed that the evidence conclusively establishes that defendant's engineer, under its airbrake system, could not get an emergency application of the brake after making the service application without releasing and recharging.”

II C

It was error in the court to refuse defendant's requested instruction No. 4, as follows. (Tr. p. 101):

“No. 4. You are instructed that under the evidence, it was not the duty of the engineer to reverse his engine.”

II D

The verdict is against law, in that the court charged the jury that there could be no recovery by the plaintiff unless it was established by the evidence that the engineer failed to exercise an honest judgment, and that for an honest mistake in judgment on his part, there could be no recovery but the uncontradicted proof shows that the engineer did exercise an honest judgment,

and that he made no mistake in his judgment, but that if any mistake was made it was an honest mistake. (See instructions under Specification III D).

III A

It was error in the court to refuse defendant's requested instruction No. 8, as follows Tr. p. 103:

"No. 8. If you find that plaintiff's act in using the push-car, referred to in the evidence, was an act likely to result in the derailment of an engine or train approaching the same, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and it would be his duty, as soon as he learned of the approach of a train to exercise reasonable care to attempt to get the car off the track or in a situation where it could not imperil the train and thus to avoid the threatened consequences, if any, of his said act. Such action on plaintiff's part would thus constitute action done by him in discharging a duty resting upon him to others and arising by reason of his alleged wrongful conduct, and for any injury sustained by him while thus engaged in removing or undoing the said effects of his said unlawful conduct, if any, defendant would not be liable under the evidence in this case."

III B

It was error in the court to refuse defendant's requested instruction No. 9, as follows. (Tr. p 104):

"No. 9. If you find from the evidence that plaintiff's act in using the push-car referred to in the evidence was an act likely to result in the derailment of the engine or train, or of any engine

or train proceeding on the track, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and the railway company would owe him no duty of care and would owe to him no duty other than not wilfully and intentionally to injure him, and your verdict must be for the defendant."

III C

It was error in the court to refuse defendant's requested instruction No. 10, as follows. (Tr. p. 104):

"No. 10. The law does not impose a duty upon defendant to exercise care not to injure unintentionally a person who is trespassing on its railroad track without right, and engaged therein in an undertaking which may result in damage to defendant if such undertaking was not only unlawful, but constituted at least a moral wrong which might result in serious consequences. Thus a contractor engaged in erecting a building is not liable for carelessness on the part of his employes resulting in injury to a person who has gone on the premises with the intention of blowing up the building, or with the intention of removing explosives therefrom which he had previously placed there for the purpose of blowing up the building, for the law will not create a duty of care for the protection of one so engaged in doing a criminal or unlawful act or in trying to undo the consequences thereof."

III D

It was error in the court to charge the jury that any duty of care was owing to the plaintiff while he was a trespasser engaged in acts involving moral turpitude, or likely to cause a wreck-

ing of the train or injuries to the persons on it. The said charge of the court is as follows (p 107-108; 110-113) is set forth in Specification V A.

III E

It was error in the court to charge the jury that, though the plaintiff knowingly used the track and push-car, knowing that the same might derail the approaching train, the defendant, under such circumstances, would owe to him the duty to exercise any degree of care to avoid injury to him, the said charge being set forth in Specification V A.

IV A

It was error in the court to refuse defendant's requested instruction No. 5, as follows (Tr. p 101):

"No. 5. The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent, and that the negligence of each contributed to cause the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury, then he cannot recover."

IV B

It was error in the court to refuse defendant's requested instruction No. 6, as follows (Tr. p 102):

“No. 6. Where both plaintiff and defendant are present, and plaintiff is in possession of his mental faculties and is or continues to be negligent, then such negligence continues as a proximate cause of his injury as long as he continues to be present and in possession of his faculties and he cannot recover.”

IV C

It was error in the court to refuse defendant's requested instruction No. 7, as follows (Tr. p 102-103):

“No. 7. If you find that plaintiff was guilty of any negligence, and that such negligence or any carelessness or other act on his part threatened injury to persons on the train as it approached, and the plaintiff remained on the track to avoid the consequences to others of his said negligence and carelessness, then you are instructed that under such circumstances his said negligence and carelessness continues as a cause of the accident, even though he acted reasonably in trying to avoid the consequences thereof, and he cannot recover.”

IV D

It was error in the court to refuse defendant's requested instruction No. 11, as follows (Tr. p 105-106):

“No. 11. If you find that plaintiff remained on the track and endeavored to remove the hand-car from the track in order to prevent the derailment of the approaching train, and that his conduct in this respect under all the circumstances was reasonable, nevertheless, he cannot recover if the hand-car being on the track was the consequence of his own wrong, if any. In other words, a person engaged in protecting life, limb

or property cannot recover merely because at the very time he was in peril, he was acting under the perils then existing, and to avert which he was engaged, when the necessity for his so doing is caused by his own negligence; that is to say, a person cannot escape the consequences of his own anterior negligence merely because at the time he was injured, he was engaged in trying to avoid the consequences to others of such negligence, and in so doing, was acting reasonably, or without negligence; in such case, his anterior negligence would continue as a cause and would bar a recovery."

V A

It was error in the court to instruct the jury as follows: (Tr. p. 110; p. 114-115).

To the effect that the plaintiff's negligence in using the hand-car at all, or in having the hand-car on the track where it was likely to derail the train, and whereby it would be necessary for him to remain on the track to save the train and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the question as to whether or not he was guilty of contributory negligence must be determined by judging whether or not it was proper for him to stay on the track to save the train, and that his negligence in having the hand-car on the track in the first place, or in attempting to use it, would not constitute contributory negligence, the court's said instructions being as follows:

"The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent and that the negligence of each contributed *up to* and caused the

injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury *at the time of the injury*, then he cannot recover."

"A party in the position that *this plaintiff was, in bringing himself there, was guilty of contributory negligence*; but up to that time, you can put that out of sight, because, while he put himself there by his negligence, he was entitled to the rules of law governing the protection of trespassers, in so far as the law is applicable here.

"If Harman remained with the hand-car in his attempt to remove the same from the track in a reasonable effort to avoid a probable disaster, if the car made disaster possible, to the approaching train and persons riding thereon; then it is relevant for you to consider this proposition of law; the law has so high a regard for human life that it will not impute negligence to an effort to preserve, unless made under such circumstances as to constitute rashness and recklessness in the judgment of prudent persons.

"But if you should consider that the engineer did not exercise an honest judgment and do all that was reasonably within his power to do, under the circumstances there disclosed, then you must consider whether this plaintiff *was guilty of such rashness and recklessness in remaining upon the track* in an honest endeavor to either remove his baggage or hand-car, or both, as to make himself guilty of negligence *at the very moment he was struck by the engine* and the hand-car; that is to say, if the plaintiff was guilty of conduct *at that particular moment when he was struck*, or immediately preceding it, that a prudent, reason-

able man would not have done, under the circumstances, then no matter what the engineer's judgment was, or the engineer's failure was, if his negligence contributed to his own injury *at that moment* why then, again, the plaintiff would not be entitled to recover.

"But you have a right to consider in weighing the plaintiff's conduct, this instruction that I have just given you, and that he says to you that he feared the wreckage of the passenger train, and hence he stayed with the hand-car in his efforts to remove it. Now, if that is what a prudent and a reasonable man, animated also by a desire to save life would do, then the plaintiff would not be guilty of any neglect at that moment, depriving him of a right to recover, if the engineer of the defendant was guilty of negligence in seeking to preserve and protect him, and it caused the injury."

V B

It was error in the court to charge the jury that the plaintiff to have been guilty of contributory negligence proximately causing his injury must have been guilty of some act of new negligence at the very time of the injury, irrespective of whether or not any antecedent negligence of his contributed to injury or was the cause of his remaining on the track, as set forth in the court's instructions under Specification of error No. V A.

V C

It was error in the court to charge the jury that the plaintiff's negligence in having the hand-car on the track where it was likely to derail the

train, and whereby it would be necessary for him to remain on the track to save the train, and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the question as to whether he was guilty of contributory negligence must be determined by judging whether or not it was proper for him to stay on the track to save the train as set forth in the court's instructions under Specification of error No. V A.

III

BRIEF OF ARGUMENT.

As already outlined, the brief of the argument will be divided into two parts, and each part into two subdivisions:

First, negligence on the part of the defendant, which raises the question (a) as to whether, under the assumption that there was any duty of care owing to the plaintiff, the evidence is sufficient to show a failure to exercise reasonable care; and (b) whether, as a matter of law, in the case of one wilfully appropriating a heavy instrument, such as a push car, and unlawfully obstructing the track in reckless indifference to the safety of trains operating over the track, with full knowledge also of the fact that thereby he is imperiling the lives of others—the engineer and passengers on the train—the law will recognize the

existence, of a duty to use care on the part of those, for whose safety, in the lawful use of the track, he himself, in its unlawful use, is so indifferent.

Secondly, contributory negligence on the part of the plaintiff, which involves (a) First: the instruction of the court to the effect that the plaintiff, in remaining on the track, must have been negligent to the extent of being reckless, and (b) the error of the court in ruling that plaintiff's negligence in using the car and in operating it without a flag ahead in advance of the curve, could not be considered as a contributing cause of the accident, but must be "laid aside," and his negligence, as a cause, judged from his actions at the very time of the injury. These will be considered in the order outlined above.

A

Negligence on the Part of the Defendant.

(a)

Is there any Evidence of a Failure to use Care?

The evidence on this matter has already been reviewed. The engineer testified as to the acts done by him. As already outlined, it is conceded that he had, at most, about five hundred feet in which to act, with his train going forty to forty-five miles an hour, in the open country, where he would naturally expect no obstruction on the track. He says, briefly, that he had already made a service application of the air brake, so that he could not thereafter get the emergency effect. He then says that, as soon as he saw the plaintiff, as

the engine and the push car both rounded the curve, he pushed the lever the remaining distance into the emergency position and got only the full braking power short of emergency (Tr. p. 54-55). The testimony as to the acts done by the engineer is unimpeached, and the testimony that it was mechanically impossible to stop the train was also practically undisputed. We bear in mind that the tables introduced by both parties showed actual distances from the points where the brakes were actually applied to the points where the stops were actually made, and represented emergency applications. The plaintiff's own tables relating to passenger trains showed that, in emergency applications on lesser grades, greater distance was required than was available in this instance.

As regards the opinion evidence, for the reasons set forth in the review thereof, the same is unworthy of credence. The witness sought to induce the jury to believe that short stops had been made by brakes, but was forced to admit that the stop was not caused by brakes, but by the impact of a collision.

It is not true that the truth of every statement of fact is for the jury's determination (See *Escalier vs. Great Northern Ry. Co.*, 46 Mont. 238, 127 Pac. 458. We conceive that, where a witness has made preposterous statements to the effect that a train, going twenty miles an hour can be

stopped by brakes in ten feet, and where a witness has sought to create a false impression before a jury, and where he tries to qualify as an expert, when he has been dismissed from the service of two railway companies on the ground that he did not stop his engine in time, and has been in several wrecks, there is a limit beyond which it can not be claimed that his mere opinion can affect positive testimony as to what was done. The tables themselves, also, exhibiting what is mechanically possible, and the photographs of the locality, exonerate the engineer in this case, without any consideration of what would be a reasonable allowance of time consumed in the forming of a judgment and going into action, especially in view of the admitted fact that the air was charged with snow.

(b)

Plaintiff's Wrongful and Unlawful Conduct Involving Moral Turpitude, places him Beyond the law of mere Care, and no Duty of Care was Owing.

We contend that, as in this case the plaintiff was not merely a trespasser, and was guilty of no mere technically wrongful conduct, but as he had wilfully and unlawfully, and with full knowledge of its consequences, appropriated a railway appliance, dangerous to human life, and recklessly operated it over a railway track, in indiffer-

ence to the rights or safety of the engineer and passengers, the law would recognize, in the event of injury, a cause of action in favor of the engineer or passengers against him, by reason of his unlawful conduct, but not a cause of action by him against them, and it is strange in the extreme if the law of negligence (already reaching far beyond the limits at first supposed) will be extended to a case of such a character. •

We appreciate that, where a person is guilty of a mere technical wrong, in no way, in a legal sense, connected with an injury received by him, the law might nevertheless recognize a right on his part to recover for injuries sustained by reason of negligence, since, in such a case, his technical violation of the law may be in no way the cause of, or connected with his injury, but all courts recognize the distinction between mere *prohibited wrongs*, and acts *inherently wrong*, and we take it that the statement could not be challenged that, *where plaintiff's conduct is not merely prohibited, but is inherently wrong, involving moral turpitude or obliquity, and his wrong is connected with his injury, then, in such a case, the issue need not be one of contributory negligence, but, on the contrary, a preliminary question, as to whether it is legally possible for there to be legal negligence on the part of the defendant, arises. We maintain that, in such a case, it is not necessary to show that negligence on the*

part of the plaintiff contributed to cause the injury, but *plaintiff's wrongful conduct*, (aside from wrongful conduct on his part exhibited by negligence) *is so connected with the injury that the law will not lend him its aid; as a transgressor of the law, he is not in a position to obtain relief at the hands of the law; to a person in his situation, while so engaged, the law will not throw about him a protecting duty of care*, and without a duty of care, there can, of course, be no negligence.

Out of the host of cases in which this principle is discussed, but which are not sufficiently similar, on other facts, to the instant case, to justify a collation of them, perhaps the principles are not more clearly stated than in

Newcomb v. Boston Protective Department, 146 Mass. 596, where Justice Knowlton says:

“The question before us then is, whether or not the defendant was entitled to this instruction,—in other words, *whether, if the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him*, according to the view which the jury should take of his conduct as a whole, in its relation to the accident.

“As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, il-

legal conduct of a plaintiff directly contributing to the occurrence on which his action is founded, is an exception to this rule. Said illegality may be viewed in either of two aspects: *looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law.* In the latter aspect it wears a hostile garb and *an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law.* In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's violation of law has usually been discussed in connection with the subject of due care.

"No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. *Hall v. Ripley*, 119 Mass. 135; *Banks v. Highland Street Railway*, 136 Mass. 485; *Tuttle v. Lawrence*, 119 Mass. 276, 278; *Lyons v. Desotelle*, 124 Mass. 387; *Heland v. Lowell*, 3 Allen, 407; *Steele v. Burkhardt*, 104 Mass. 59; *Damon v. Scituate*, 119 Mass. 66; *Marble v. Ross*, 124 Mass. 44; *Smith v. Boston & Maine Railroad*, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering on the ground that *the Court will not lend its aid to one whose violation of law is the foundation of his claim.* *Hall v. Corcoran*, 107 Mass. 251.

“The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff’s unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects his act was negligent or not, the Court could not properly permit him to recover. The instruction, therefore, should have been given.”

We would also refer the court to the case of
Wallace v. Cannon, 38 Ga. 199
where it must be conceded that the court should, on the facts, have recognized the effect of a de facto government, but the principle laid down by the court is correct.

In considering cases where liability was recognized, in spite of the unlawful conduct on the part of the plaintiff, of an entirely different character than the conduct of the plaintiff in this case, we should bear in mind that here, in the language of those cases, it can not be said that “the plaintiff had no occasion to show that he was engaged in any unlawful pursuit.” On the contrary, this was the basis of the plaintiff’s whole case. It can not be said also that he “had not attempted to derive any assistance” from his illegal conduct, and, in view of the plaintiff’s claim that he remained on the track to save the train from “serious consequences” of his unlawful conduct, this is particularly apt. Moreover, it cannot be said that “both parties equally par-

ticipated in the unlawful conduct," and that "it was the defendant, and not the plaintiff, who had occasion to invoke assistance," on the ground of unlawful conduct. In the language of these cases also, it can not be said that here, the plaintiff's unlawful conduct "did not contribute to, or was not connected with" the accident.

The principle is recognized in these exceptions also, that defendant participating "can not take advantage of its own wrong," and that defendant can not, as a defense, "assert *a separate and distinct wrongful act of another, done, not to himself nor to his injury, and not connected with the wrong complained of.*" *Here the wrong of the plaintiff is not distinct or separable from the accident. It is not a wrong to others than the defendant; it was a wrong to the defendant and those in privity with the defendant—its passengers and employees. And it was connected with the accident. Here again, in the language of the courts, which, in fact, denied liability in the cases before them, but recognized the principle for which we are here contending, it is true that "a relation existed between the wrongful act or violation of the law on the part of the plaintiff, and the injury or accident of which he complains, here such as to have caused or helped to cause the injury, or accident, in the natural or ordinary course of events, and his unlawful conduct was naturally and ordinarily calculated to produce the injury, or*

was conduct from which the injury or accident might naturally and reasonably have been anticipated.

So clearly does this appear that *the plaintiff himself confesses* that, while operating the push car, his companion warned him to be prompt in the effort to remove the car should occasion arise, and the plaintiff himself states that *he found it necessary to keep a very sharp and constant look-out* for approaching trains as he went into the curve, *and that his first thought, when he saw the train, was that he was going to get into very serious trouble. Having escaped that very serious trouble, which he himself anticipated was to follow from his wrongful act, will the law now impose a duty of care on those, for whose safety he was so indifferent, and will the law throw about him, while so engaged, a protecting duty of care?*

We think not. We think that, in this case, it is not necessary to prove that plaintiff's wrongful conduct consisted in a failure to use care. We may rest the case on the proof that the plaintiff's wrongful conduct consisted of wilful and unlawful acts calculated to produce serious injury to the defendant and those in privity with it, and involved moral turpitude, and under such circumstances, his wrongful conduct prevents the imposition of a duty of care, as distinguished from a wilful wrong, on the part of those threatened by his wrongful conduct.

A

Contributory Negligence on the part of the
Plaintiff.

(a)

*Plaintiff's conduct need not have been reckless
or rash to be Negligent.*

As heretofore outlined the court instructed the jury that, if the jury found that the defendant was negligent, then plaintiff could recover, unless his remaining on the track to remove the car amounted to recklessness or rashness. Under the law, even under the assumption that plaintiff's negligence at the very time of the injury was the test, the test would be whether the plaintiff failed to exercise such reasonable care as the average reasonably prudent person would ordinarily exercise under all the circumstances, for this is the definition of negligence.

Birsch v. Citizens Electric Co. 36 Mont. 574, 93 Pac. 940.

This might be very far short of recklessness or rashness. The court by its instruction, therefore, required defendant to discharge too great a burden when the charge was given that plaintiff would not be negligent, unless his conduct was so negligent, or his want of care was so great, as to amount to rashness or recklessness.

(b)

Plaintiff's Conduct in Appropriating the Car and his Operation of it was Negligence continuing as a Cause of the Injury.

Let us bear in mind that *the court expressly charged the jury that the plaintiff, in using the push car, and in operating it into the curved track, was guilty of negligence, which negligence the court (strangely enough in the light of its final decision) characterized as contributory negligence. But the court expressly charged the jury that this contributory negligence should "be laid aside," and that the sole issue on negligence of the plaintiff should be the reasonableness of his conduct in remaining on the track in the face of the onrushing train to save life or property.*

This was clearly error. The court was right in instructing the jury that, as a matter of law, the plaintiff's appropriation and use of the car was negligence, and that this negligence was contributory negligence, but the court should have gone further and instructed the jury that, if this negligence was the cause of his remaining on the track, then it would be a contributing cause of the accident, and the court should have directed a verdict for the defendant.

The general rule, that the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, and that one who attempts to rescue another from imminent

danger, if acting reasonably, is not guilty of contributory negligence, is not applicable where the person gets into such situation by reason of the negligence of the person attempting the rescue. In such a situation, the plaintiff is acting under a primary duty owing by himself, by reason of his wrongful conduct, and is thereby acting for his own benefit, and for the purpose of preventing the accrual of a cause of action against him.

In

29 Cyc., p. 524, sub. Negligence,

it is stated in reference to this rule:

“The rule is not applicable where the person gets into such situation by reason of the negligence of the person attempting the rescue. The rule exempting a person injured from the charge of contributory negligence because of an act done in an emergency applies where the emergency is caused by the negligent act of another. If such emergency is brought about by the person injured negligently placing himself in a position of peril, he cannot recover.”

We also refer the court to the following authorities:

N. Y. Trans. Co. v. O'Donnell, 159 Fed. 659;
86 C. C. A. 527.

Alt. & C. A. L. Ry Co. v. Leach, 17 S. E. 619;
91 Ga. 419.

DeMahy v. M. L. T. Ry. Co., 45 La. Ann.
1329; 14 Ga. 61.

Bothwell v. Boston Elev. R. Co., 102 N. E.
665.

West Chicago Etc. Ry. Co. v. Liderman,
187 Ill. 463; 58 N. E. 367 (dictum).

Dummer v. Milwaukee Elec. Ry. Co., 108 Wis. 589; 84 N. W. 853.

Smik v. N. & W. Ry. Co., 60 S. E. 56 at 58; 107 Va. 725.

Chatanooga Etc. Ry. Co. v. Cooper, 705 W. 72.

Berg v. Milwaukee, 53 N. W. 890.

If the court's view is correct, then, if a person negligently places an infant on a railroad track while a train is approaching, and does nothing more, he is liable for the death of the infant, but if he attempts to rescue the infant, he is not liable, because, by some mysterious process, as soon as he attempts to remove the infant, his negligence in placing the infant there ceases to operate as a legal cause. Logically carried out, the court's ruling would require that the engineer and the plaintiff would each be liable to the infant, if plaintiff did not attempt a rescue, but that the engineer would be liable also to the plaintiff for an injury sustained by the plaintiff if the plaintiff attempted rescue and such attempted rescue would not only relieve the plaintiff from liability to the infant, but create a liability in plaintiff's own favor.

Undoubtedly, if the train had been derailed by the push car, the passengers would have had a cause of action against the plaintiff, because his negligence would be a contributing cause of the collision. By what mysterious process does

his negligence cease to be a contributing cause when he himself is hurt or is suing?

But the plaintiff's own testimony shows that his appropriation of the car contributed as a cause of his injury up to the very moment of the collision, and that "*a relation existed between plaintiff's negligence and the injury, of which he complains, such as to have caused, or helped to cause it in the natural or ordinary course of events, and his negligence was naturally and ordinarily calculated to produce the injury, and was an act from which the injury or accident would naturally and reasonably have been anticipated.*" for the plaintiff himself testified that *he himself anticipated the collision*, and the necessity of a very prompt removal of the car from the track was the subject of discussion by him and his companion as they proceeded, and he himself stated that *his first thought* when he saw the train *was that he would get into very serious trouble.*

Moreover, it was the plaintiff's negligence which, in his opinion, made it necessary for him to remain on the track, and thus it continued as an operating cause of the injury to him as long as he remained on the track. If he had not remained on the track, and a derailment of the train had resulted, he would have been liable, and, therefore, he says he remained on the track to prevent "getting into very serious trouble"—to

prevent the accrual of a cause of action against him by reason of his negligence. If then, had the train been derailed by the collision, his negligence would have been a cause of the collision and injury to others, and the foundation of a cause of action against him, how does his negligence cease to be a cause of the collision and of the injury to him, merely because he says he endeavored to avoid a cause of action against himself?

But see how clearly his negligence in appropriating and operating the car continued as a cause of the accident! It would be admitted by all that, *for a person to remain on a track in the face of an onrushing passenger train, whereby he sustained injury, would be contributory negligence*—it would be gross negligence, negligence amounting to rashness and recklessness,—and the plaintiff could not recover. *The plaintiff then, to excuse this act of his, is compelled to seek aid from his previous illegal and negligent conduct. He accordingly says that he remained on the track up to the very moment of the collision because, by reason of his wrongful and unlawful appropriation of the car, and his negligence in using it and in the operation of it without a flag ahead around the curve, a collision was imminent, and he says it became necessary for him to correct or avoid the certain and natural effect of that negligence.*

We thus find that, up to the very moment of the accident, he is appealing to his own unlawful

and reckless conduct as an excuse and as an assistance.

If he had not used the car, or if he had had a flag out ahead around the curve, the collision would have been avoided. But for his negligence the collision would have been avoided. Even if the engineer is deemed guilty of negligence, then the collision was caused by the negligence of each, and both defendant and the railway company might have been liable to the passengers. Could the court, in an action by the engineer or passengers against plaintiff to recover because of plaintiff's negligence, have directed a verdict for defendant on the ground that the defendant's (plaintiff's) negligence did not constitute a cause of the accident? Yet this is what the court did. *The court has directed the jury to return a verdict for the plaintiff on a matter of contributory negligence which was at least a question for the jury. ..*

By what process of reasoning, therefore, can plaintiff's negligence cease to be a cause of the injury to himself when he says that his negligence continued so far to operate as a cause of the collision up to the very moment of the collision, that, up to that moment he felt compelled to remain on the track to seek to diminish the disaster which would result from that collision. Is he not thereby admitting that up to the very moment of the collision he finds it necessary to seek aid

from his own negligent and unlawful conduct?

It seems that plaintiff is seeking to gain some comfort from the doctrine of the last clear chance, but this doctrine is not applicable here, since, before that doctrine can have any application, a plaintiff's negligence must have been so far anterior in point of time and attendant circumstances that it has ceased to act. But here the plaintiff's acts were done with full knowledge of the possible consequences; he was at all times, both in the appropriation and use of the car, and at the very moment of the collision, in full possession of his mental faculties, and as responsible an individual as anyone else, and, as an excuse for remaining on the track, he is compelled to admit that his negligence, both in point of time and attendant circumstances, continued as an operating (he says impelling) cause (not as a remote cause) of his injury up to the very moment of the injury. It is not at all similar to the case of a person who, by reason of his negligence, becomes helpless on a track, and is negligently run down by a defendant after discerning his peril and helplessness. Here the plaintiff would have been safe, but it was, according to his view, necessary for him to remain on the track to undo or change the possible consequences of his negligence: It may be that this would result in his avoiding civil and criminal liability for injury to others, and that to do this it was necessary that the in-

jury should be shifted to him. But, if the shifting of the injury to him was necessary, in order to enable him to escape criminal and civil liability to others, surely this is no reason for permitting him to shift the burden to defendant, caused by his negligence.

This court has heretofore called attention to the limits of the scope of the last clear chance doctrine:

N. P. Ry. Co. v. Jones, 144 Fed. 47 at 51 & 52.

We contend, inversely, that (1) the court was in error in charging the jury that the plaintiff could recover, unless his negligence amounted to recklessness or rashness; (2) that *the court was clearly in error in positively directing the jury that the plaintiff's wrongful conduct*, evidenced by his negligence in appropriating, or in the manner of operation of, the car, *could not be a cause of the accident*, and should be "*laid aside*," and that plaintiff's negligence must be judged from the condition of things at the moment of his injury, and by considering merely whether it was reasonable for him to remain on the track to save life or property from disaster, regardless of whether or not such disaster was superinduced by his own negligence.

But, whether or not the plaintiff's wrongful conduct be considered as evidencing negligence on his part, we take the position that the engineer was not shown to have been lacking in care, and

we earnestly urge that it is not necessary for defendant to show that it was not negligent, and, as it appears that plaintiff's acts were unlawful (negligently so or otherwise) and constituted wrongs involving moral turpitude, the preliminary question arises whether there can be *any legal duty of mere care* to one while so engaged.

We earnestly ask for a ruling:

FIRST, *where a person, wrongfully and unlawfully appropriates a push car or other property of a railway company, and wrongfully and unlawfully operates it over a railway track under such circumstances and conditions that his operation of the same would be negligence on the part of a railway employe, and he knows of the probable consequences of his acts (as is evidenced by his declaration to companion that it would be necessary promptly to remove the car in the event that a train should approach, and by his declarations that he found it necessary in operating the car to keep a sharp and constant lookout for trains), in such a case, in the event of a collision between a passenger train and such car or other obstruction placed by the plaintiff, whereby the same is thrown against plaintiff, and plaintiff injured, the plaintiff can not recover, for a mere want of care, because in such a case plaintiff's wrong (whether negligent or otherwise) is a wrong involving moral turpitude, and in the prosecution of that wrong he has placed himself*

beyond the pale of the law of care, and, being a transgressor of the law, he cannot seek aid of the law in any matter to which his transgression has contributed, or with which it is connected, and the law will not throw about him a protecting duty of care, or, in his lawless use of the track, impose such duty, for his benefit, upon others, lawfully using the track.

SECONDLY, in so far as the injured party remained on the track under the circumstances aforesaid, in the face of the oncoming train, for the purpose of removing the car or other obstruction from the track, so as to avoid a derailment of the train, *such action*, even if otherwise proper, *would not prevent his previous acts in the operation of the car from contributing as a cause of the accident*, and would not impose a liability on defendant if none would otherwise exist, since, in such case, *his prior negligence continues as a cause of the accident*, and the law will not excuse his remaining on the track, or protect him therein when *made necessary to remove the consequences of his own negligence*, or otherwise permit him to *secure any aid by an appeal to his own wrongful conduct*.

The judgment should be reversed, with directions sufficient to show that the defendant is entitled to judgment.

Respectfully submitted,

VEAZEY & VEAZEY,

Counsel for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff in Error,

vs.

CHARLES HARMAN,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

For brevity, we call the plaintiff in error the "Company;" defendant in error "Harman."

We feel constrained to re-state the case. We are not satisfied with plaintiff's statement.

Somewhat like the classic of Marshall, C. J., concerning one of Pinckney's arguments:

"Counsel, with the brush of an artist, has painted a wondrous picture. It chained the mind of us all by the precision of its lines of perspective and its happy choice

of colors; but we could find no resemblance between the record of the evidence and the argument of counsel."

Before making our statement of the case, it might be well to announce the proposition of law which the verdict answers to. This proposition is well described in a quotation of a jurist of North Carolina :

"The case therein cited (*Davies v. Mann*, 10 Mees and W. 545), in which the plaintiff's immortal donkey, by its death, established a great principle, and left a world known name, is regarded as the origin of the rule. The plaintiff fettered the front feet of his donkey and turned him in the highway to graze. The defendant's wagon coming down a slight descent at a 'smartish' pace, ran against the donkey and knocked it down, the wheels of the wagon passing over it. The poor brute meekly closed its wearied eyes and gave up the ghost: an apparently immortal spirit that has long since put *Banquo's* ghost to shame. From such an humble beginning arose the great doctrine of the last clear chance."

Bogan v. Carolina Cent. (Douglas, J.) (N. C.) 55
L. R. A. 422.

The soundness of this doctrine of law has been many times affirmed by the supreme court of the state of Montana. A clear decision on the subject is found in *Melzner, Adm'r. v. N. P. Ry. Co.*, 46 Mont. 162.

The court will pardon us if we do not voluntarily submit the brief with the foregoing allusions to the donkey to our client's perusal when it is seen in the record that the plaintiff was a lieutenant of a volunteer regiment in the late unpleasantness with Spain, and that he somewhat reluctantly admitted that he had been shot when vigorously cross-examined

by the learned counsel for the company as to whether he had ever received any injuries before that administered by the engineer.

STATEMENT OF THE CASE.

The merits of an appeal are often like the law of photography, explained in the record, page 37 :

“The size of an object in a photograph is in the inverse to the square of the distance from the camera.”

Frequently the merits of an appeal are inversely proportionate to the length of the brief of the appellant.

Harman, a citizen of Montana, brought suit against the company, a citizen of the state of Minnesota for an amount in excess of three thousand dollars. 2R.

He alleges that the defendant, by and through one of its engineers, carelessly and negligently did drive and run its said engine into and against Harman and caused him grievous bodily injury. He alleges facts which, under the federal rule though not under the rule of our state supreme court, shows that he was not a trespasser, but was rightfully at the place; and also facts which made it the duty of the defendant not only not to injure him after discovering his peril, but also imposed upon the defendant the duty of a lookout, and of giving warning in obscure places.

Cahill v. Chicago, Etc. Co., C. C. A. (7th) 74 Fed. 285.

The defendant in a separate defense pleads contributory negligence on the part of Harman. We mention this because we shall show hereafter in the brief that the plea of contributory negligence under the Montana rule admits the negligence of the defendant and that it was a proximate cause of the plaintiff's injuries.

The facts showing that Harman's presence should have been expected at the place where he was injured are as follows:

"The track from the tunnel where he had been employed to Basin was a general thoroughfare. Everybody that went from the town of Basin to the tunnel or from the tunnel to the town of Basin used the railroad track. During the two weeks that I was there from forty to sixty men were working at that tunnel. They were divided into night and day shifts. The night men would be using the track as a thoroughfare more or less in the daytime, and the day men would use it at night. Emergency supplies were procured from Basin for the tunnel by being brought back on *this hand-car*. This had been going on ever since I had been there. (He was there two weeks.)

"The road is crooked. It is necessarily a very crooked railroad. It follows the creek to a certain extent, and the point of the hills just out into the valley." 22R.

By reason of the foregoing testimony, we say that the lower court unduly limited the case to the doctrine of the last clear chance because the foregoing situation shows that there was a condition of repairing going on at this tunnel, and that the track was being used by these workmen so continuously that it was the duty of the engineer to look out for them.

(This is not the Montana rule, but it is the Federal rule, and it is a question of general law not covered by our statute of Montana. The federal nisi prius court in Montana has frequently refused to follow the narrow state court rule.)

"I first saw the train when it was within four or five hundred feet of the hand-car we were pushing; the train was then coming from a curved track. We were on a

curve also. The place from which the train came was on a curve and necessarily obscure." R. 24.

"Q. What is the general custom among railroad engineers and people operating trains in the United States as to making signals at obscure places?"

(After objection overruled)

"A. Sound the whistle. On this occasion no whistle was sounded."

Witness follows with circumstances sustaining his averment of no whistle being sounded.

"When I first saw the engine it was about four hundred feet away. I would say the grade of the track is about a two per cent. grade, down grade from Basin to the tunnel. It was what I would call a slight grade.

"I have had considerable experience stopping and starting trains and engines. I have used air-brakes and am familiar with their use. I have used air-brakes on steam engines, on donkey engines and such as that from the time ever since I began to work."

(Witness testified elsewhere, R. 22, that he had been working for railroad companies since 1889 and 1890.)

"I have an idea of the use of air-brakes on freight trains. I have handled air-brakes when I was a fireman. I have a knowledge of the approximate distance within which a train of the kind which struck the hand-car may be stopped. There were five or six coaches on that train. If there weren't more than six coaches with one engine on that grade, according to my experience, that train could be stopped in less than a train length. I have seen them stop a heavy train within ten or fifteen feet, going twenty-five or thirty-miles on hour. (Up or down grade

not given.) The train which struck our hand-car was going about twenty miles, (an hour), I dare say, when the train struck the hand-car when I was injured. I hadn't observed any checking of the speed of this train which struck the hand-car." 25 R.

"The hand-car, during the two weeks that I had been there, had been used for transporting stuff of Bates and Rogers, (contractors for whom Harman was working), and anyone else in connection with the work, from one end of that tunnel to the other, and from Basin to the other end of the tunnel. I intended, when I might get to Basin to take our stuff off and bring the hand-car back to the tunnel."

"I saw and heard the train coming, and it was in sight, and I was occupied in getting the hand-car and stuff off the track. I didn't have time enough to get into the clear myself and avoid the train. I suppose I could have gotten into the clear myself, if I had left the hand-car on the track." R. 26.

"If I had left the hand-car on the track, the effect would have been nothing other than wrecking the train, provided the engineer didn't stop. When the hand-car was struck I was endeavoring to get the car shoved over a little further so that it would clear good." R. 27.

The injuries were serious. The verdict was excessively small—fifteen hundred dollars. A photograph was introduced. It should be in the clerk's hands of the appellate court. It is exhibit 7. It shows to the most casual observer of railroad trains that from the point marked as the first place where the engineer saw Harman to the point marked as the place of the

event is ample distance to stop a train going faster than anybody testifies that this one was going.

The engineer was placed on the stand by Harman, 43 R :

"I was locomotive engineer, on the right hand side of the cab, looking the way the engine was going. I was looking forward during the entire time the engine was running. My eye was on the track ahead as far as the eye would reach. For the first half mile out of Basin east the track is almost in a straight line. Then you come into curves, and it is mostly curves from there to Boulder. I know where the tunnel is east of Basin. On passenger and freight trains I have been running on that track as an engineer about eighteen years.

"I couldn't say just exactly when the work of relining the tunnel was commenced. I think it was in May or June, 1912, about six months before November 28th, I should judge. I would pass there pretty nearly every day, one day going east and the next going west. I have indicated on plaintiff's exhibit 7 with a "C" the point where I would say the push-car was after the accident. I would say I struck the hand-car around here some place where I have put an "S." R. 43, 44.

"We were running, I should judge, thirty to thirty-five miles an hour. I was looking ahead as I was going around this curve. When I got into the curve just after bracing the train for the curve, I looked ahead as I got a view around the curve and I saw that there were two men throwing baggage off the push-car, and the push-car was crosswise of the track. I saw the men as soon as I could see them." R. 44, 45.

"It was snowing at the time." 55 R.

"We were about seventeen rail lengths from where he was. A rail is about thirty feet, I think."

A. E. Lynes, a witness in rebuttal for the plaintiff, R. 84 :

"I have been a locomotive engineer and know the track of the Great Northern Railway Company between Basin and the tunnel east of Basin. I worked on the Great Northern between Clancy and Butte for about four years as locomotive engineer. I know the type of engine used on the Great Northern numbered 1000 to 1007, (this was the type that Whitehead was on), but I have never run engines of that type. I have never run their passenger trains from Butte to Helena, but I have fired on them. I have had experience with New York air-brakes. If an engineer was running with a passenger train of four cars and a tender, going down a one per cent. grade, forty miles an hour, on a dry track, and the engineer's valve was in running position, and the air pumped to its full capacity, and he got an emergency application of the air-brake, he could stop that train in between two and three hundred feet. With a full service application it ought to be stopped in not to exceed four hundred feet. If the engineer on coming around the curve referred to in the testimony reduced his speed by a service application from forty miles an hour to thirty-five miles an hour, there would be no delay incident to getting a full service application of the air-brakes. It would simply mean moving the same valve or lever further on into the full service application. If an engineer has made a reduction of the air by service application it would take him four seconds to re-charge. It would not exceed four seconds. It would take about three seconds to re-charge the train and

have a full application. By use of the emergency application the train should be stopped in two hundred feet. I have seen the train of the Great Northern Railroad that runs from Butte to Great Falls stopped, and my statement applies to that train. The grade east of Basin, I think, is about one per cent." 84 and 85 R.

In view of the fact that counsel have gone to some length to speak of Lynes as a discharged servant, etc. (as if that was a disgrace and not an honor in many instances), we may quote Lynes' testimony as to certain collisions that he was in.

"I wasn't responsible for those collisions as to which I was examined. I had several collisions on the Great Northern in Butte * * * I was blameless in each one, except for that one at Clancy. I took the responsibility there on my own account and got a job afterwards on the Northern Pacific, which knew of my record about that collision." 87 R.

Further about the case:

"I have stopped a train myself when it was going forty-five miles an hour in less distance than two hundred feet, when I was firing and going down a two per cent. grade. I did this on the occasion of a collision when Engineer Maze was killed. The trains stopped by the collision. The trains came together all right on that occasion but they were practically stopped before they came together." 86 R.

ARGUMENT.

The law in this case is simple. It was a question of fact for the jury as to whether Whitehead proceeded negligently after discovering the peril of Harman, first moving his baggage off, and not at first as the engineer testified, moving the hand-car.

As to whether a hand-car or a push-car was used we are willing to yield the point to the very able and discriminating argument of counsel that it was a push-car and not a hand-car. We can conceive very little difference as to the merits of the case whether it was a flat-car, a push-car, hand-car, touring-car or horse-car.

A reading of the record will show that Harman was perfectly justified in using the only available method to get his goods away from the contracting camp. He did not have to abandon them. He did not have to ford any river to get away in November. He had a right to take the only means furnished by the company from the place of work on its premises to which it had invited him, through its contractors, to work for it on its tunnel. As for hiring a vehicle with a certificate of deposit for a thousand dollars that Harman happened to have, we might refer counsel to the story appearing in one of the magazines some years ago, of the man who was in a small rural town with a thousand dollar bill which he sought to have changed, and could buy nothing; was turned out of the hotel; and finally the bill was pronounced counterfeit because the merchant, never having seen a thousand dollar bill, announced to the populace that the United States government did not issue bills in that denomination. The possessor of the thousand dollar bill finally landed in the village station house and was put upon the "chain gang" as a vagrant.

From a fair view of the testimony as to the condition of the country, the argument of counsel that Harman was a trespasser on the defendant's premises after being discharged, and before he had time to get away by the only road out, is similar to an argument advanced some years ago by the learned counsel for a mining concern, who said, and apparently in

earnest, that a man discharged 2300 feet beneath the surface was a trespasser on the cage going up after his dismissal. In other words, these distinguished corporation counsel in their professional zeal grow so blunt to the rights of mankind that they overlook the obvious humanities in almost any case.

We notice an absence from the record of the opinion of Judge Bourquin on denying the motion for a new trial. We find no fault with this omission from the record as far as the error proceedings are concerned, except that by omitting it a good argument in our favor may be lost from the view of the court. We herewith append it:

"Plaintiff trespassing on defendant's track by traveling thereon with a push car loaded with his tools and baggage, suddenly meeting defendant's passenger train, instead of stepping aside to safety as he easily might, lingered in strenuous endeavor to clear the track and was injured by the push car driven against him by the train.

"This action for consequent damages was tried on the theory of the 'last clear chance' and defendant's negligent failure to meet the requirements thereof. There was a verdict for plaintiff and defendant moves for a new trial upon the ground, so far as argued, that (1) defendant was not negligent in that to plaintiff, a trespasser, whose act was wilful and gross negligence and of moral turpitude in that it imperiled the safety of defendant's employes and passengers, it owed no care and no duty save not to wilfully or wantonly injure him, and that in any event it conclusively appears that defendant's engineer from the moment he first saw plaintiff to the moment of the injury did all practicable to stop the train and avoid the injury, and (2) if defendant was negligent, plain-

tiff's antecedent negligence was continued after he became conscious of his peril, by his efforts to clear the track when he easily might have escaped to safety, and this negligence contributed to his injury.

"That plaintiff's act was voluntary and gross negligence and imperiled the safety of defendant's trains and the lives of employes and passengers, is clear, but so to lesser extent is and does that of any trespasser upon tracks. The doctrine of the 'last clear chance' is not limited to any particular degree, if any there are, of negligence. Its protection extends to all negligent and trespassers, whether traveling along tracks or across them, alone or in or with any kind of conveyance. The duty by said doctrine imposed is in all cases the same—to exercises that degree of care and diligence which is reasonable in view of the circumstances to avoid injury to another whose peril is perceived and appreciated. This is the better rule, dictated by humanity, and it is the rule in Montana.

"Melzner vs. Ry. Co., 46 Mont. 182.

"That plaintiff was injured in performing his duty to avoid the possible consequences of his antecedent negligence, does not deprive him of his remedy as defendant contends. His antecedent negligence was but a condition and not the cause of the injury. It was defendant's failure to discharge its duty imposed by the 'last clear chance' doctrine that was the proximate cause of the injury. And for this reason, for the destruction of the push car, or the train had it occurred, defendant, contrary to its contention, has or would have no cause of action against plaintiff. It is familiar law that he who by reasonable care can preserve his property imperiled by the negligence of an-

other, has no right of action for injuries thereto due to his failure to exercise such care. His failure of his duty is the proximate cause of the injuries; the other's negligence is but a remote cause. Antecedent negligence is the foundation of the doctrine of 'last clear chance.' Without the former there is no occasion to apply the latter, and the former is material only in that it imposes the duty of the latter.

"There are cases that hold or tend to hold that he whose negligence exposes another to peril from the negligence of a third person, has no right of action against the third for injuries received in attempts to preserve the second from the peril.

"See *Ry. Co. vs. Zartt*, 64 Fed. 828.

"There are other to the contrary.

"See *Donahue vs. Ry. Co.*, 83 Mo. 560.

"For other cases more or less in point, see 29 Cyc. 624; 53 L. R. A. 267.)

"The latter conform to the 'last clear chance' doctrine, and maintain the better rule.

"He who encounters danger to preserve the imperiled life of others, is animated by humanity and is discharging an obligation of the highest morality, it is the policy of the law to encourage. If therein he receives injuries proximately due to another's negligence, he has his remedy therefor against the latter, though his own antecedent negligence created the situation of peril.

"Whether or not the benefits of the 'Last clear chance' could be claimed by the outlaw seeking to wreck a train or in repentant mood attempting to remove obstructions placed by him for that purpose, as fancifully queried by

counsel, can well be left for answer until a case so improbable comes on for decision.

“And whether or not the engineer conformed to the requirements of the ‘last clear chance,’ was, despite his positive asseverations, a question for the jury. Taking into consideration the testimony of the engineer and all other witnesses, the distances involved, within what distance a stop could have been made, when and where efforts to stop were made, where the stop was made, the situation of plaintiff, and all circumstances and conditions in proof, there appears no reason to disturb the jury’s conclusion.

“So likewise, was plaintiff’s contributory negligence for the jury.

“It is true plaintiff could easily have escaped to safety had he ignored the possible consequences and abandoned the push car and its load.

“But that is not conclusive.

“The question is, under the circumstances what would the average man have done.

“Plaintiff’s situation was like unto that of a trespassing teamster who crossing a track and stalling thereon, in the face of a subsequently discovered approaching train, overwhelmed by the possibilities of the situation, instead of leaping, struggles to clear the load, miscalculates, and fails to his own sacrifice. Whether or not he was guilty of contributory negligence, depriving him of the benefit of the ‘last clear chance’ rule, would present not a question of law but an issue of fact for the jury.

“Although antecedent negligence of him claiming the benefit of the ‘last clear chance’ creates the situation in-

voking the rule, there it and its consequences end.

"It can in no wise interfere with or affect the other's discharge of the duty the rule imposes. It can never be contributory negligence. Only subsequent negligence, concurrent in its nature, contributing to the injury complained of, can constitute contributory negligence.

"When the period of time and situation arrive invoking the rule of the 'last clear chance,' subsequent conduct alone fixes the duties and rights of the parties; and that without reference to what went before.

"The motion for a new trial is denied.

"January 9, 1914."

We will analyze such of the authorities of the company as we are able to find. Taking up first the case of *Newcomb v. Boston, Etc.*, 146 Mass. 596, found also 16 N. E. 559, we quote from the opinion:

"The court rightly refused the instruction requested, that the plaintiff could not recover if, at the time of the accident, he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition, of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of the vehicle which has been struck by another may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately

produces or helps to produce a result as an efficient cause, and that which is a necessary condition or attendant circumstance of it."

Brevity prevents our quoting further interesting language from the opinion. There was no question of the doctrine of the "Last Clear Chance."

Wallace v. Cannon, 38 Ga. 199, seems entirely irrelevant.

Birsch v. Citizens Electric Co., 36 Mont. 574; 93 Pac. 940, cited by the company on page 44, is aptly in Harman's favor to the point that by pleading contributory negligence the company admits its own negligence, and that it is a proximate cause of the injury. Otherwise it has no relevancy. It was an action for injuries received by reason of an electric shock, defective insulation, etc.

Taking up the next authority cited by counsel—that on page 46, and the quotation, we have searched diligently for the last two-thirds of the paragraph in quotation marks. We find this portion: "The rule is not applicable where the person gets into such situation by reason of the negligence of the person attempting the rescue." This much of the quotation is readily found at 29 Cyc., page 524, as cited by the company. After diligently viewing the page and the context, we find that counsel has either bundled three or four sentences from the preceding two pages into one consistent paragraph and made a subsequent sentence and sub-head in the book precede language appearing at other pages, or else the remainder of the quotation must come from an old English report not available to us, but well known as "Veazy, Jr." On the very page of Cyc. to which the company refers we find this language:

"Notwithstanding the fact that an attempt to rescue one from imminent danger may not amount to contribu-

tory negligence no liability rests on defendant unless it has been negligent in placing such person in peril, *or in failing to avoid injury after discovering the peril.*"

Such of the authorities as have any relevancy that are cited on page 47 and that we could find, carefully hold to the distinction set forth in the last sentence of the quotation.

N. Y. Transfer Co. v. O'Donnell, 159 Fed. 659. Not based on negligence after discovery of peril. Verdict for the plaintiff below; reversed by reason of an error in instructions; remanded for new trial. Of course the court did not have in mind the law applying when one is attempting to save life or property, nor the doctrine of the "Last Clear Chance."

The case of Railway Co. v. Leach, 17 S. E. 619. The court in applying the law expressly states that there was no evidence to the effect that the operators of the train were guilty of negligence after discovering the peril of the men and the child on the bridge.

The next case cited by counsel, DeMahy v. M. L. T. Ry. Co., 45 La. Ann. 1329, we are unable to find. If counsel means the Louisiana reports we do not know how the Georgia case got in it, and if counsel means Lawyers Reports Annotated, it is not in the table of cases, and the volume 45 has not 1329 pages in it. 14 Ga. 61, where the case is also said to be, is not available to us. It would certainly be entitled to respect on account of its age if in point.

West Chicago Etc. Co. v. Liderman, 58 N. E. 367, is a case where plaintiff recovered and we cannot see how counsel could believe that the case helps their appeal. Counsel have claimed error in the instructions. We quote from this very case cited by counsel to show that the instructions are correct:

"The law has so high a regard for human life that it

will not impute negligence to an effort to preserve it unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs or in the mere protection of property knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such is to be regarded either rash or reckless."

The case of *Dummer v. Milwaukee Etc. Co.*, cited by counsel is a case of ordinary negligence, and announces a well known elementary principle of law that contributory negligence is a defense to negligence. Not a few authorities could be cited to sustain that position.

The case of *Smith's Adm'r. v. Norfolk*, 60 S. E. 56, is a simple ordinary crossing accident case, with no issue except that of simple negligence. No element of negligence after peril discovered. It cannot possibly aid the court.

We found the volume containing the citation *Chatanooga v. Cooper*, "705 W. 72." It is 70 S. W. An examination of the case shows that counsel in citing this case to the court fails to perceive the difference between the law relative to a man acting in an emergency, and the law relative to a man acting to save life or property. And further, counsel fails to distinguish in his own mind the difference between the duty incumbent after a peril discovered and the duty before. There was no claim that the motorman in the *Chatanooga* case could have avoided the injury after the discovery of the decedent's peril.

The Berg v. Milwaukee case is a sidewalk accident and has nothing to do with the doctrine of the "Last Clear Chance." It announces that a man may not recover where he puts himself in a place of danger. If this rule were not subject to modification by the rule of law relative to discovered peril then it would have foreclosed from a recovery every plaintiff injured after peril discovered by the defendant. Its language taken without modification embraces every such case.

Counsel cannot find an opinion of a respectable court sustaining the writ of error. We shall not answer that portion of the argument going into the question of the credibility of the witnesses at any great length. There is no statute in Montana making a man incompetent as a witness because "he has been dismissed from the service of two railway companies." The writer rides on the Great Northern a great deal, and would dislike very much to see the fact of "being in several wrecks" made a disqualifying condition from giving testimony in court. Some other form of trial may or may not be better than that by a jury, but until another form is proven we should hold to the jury system.

The argument picks out adroitly several parts of instructions as being erroneous, but a reading of the court's charge will convince, that as an entirety it is fair to the defendant, though it unduly limited the plaintiff. We respectfully submit that the judgment should be affirmed.

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